

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter in strong support of Jonathan Thomas's application for a judicial clerkship.

I have had the pleasure of getting to know Mr. Thomas quite well as both his Remedies professor and as the teacher of an academic success class.

Mr. Thomas spirit and drive to improve and perform, as well as his execution, has literally wowed me. He has strong communications skills – both oral and writing. Likewise, his analytical skills are excellent. I have had numerous substantive legal and policy discussions with Mr. Thomas and can say without equivocation that he possesses rare insight, the ability to integrate and apply new information quickly, and excellent skills in reducing all this to legal analysis.

His arc in law school has been fascinating. In my capacity as an academic success instructor, I have encountered a number of students over the years who started more slowly than others in law school but by the second or third year were exceeding the performance of their classmates. Jonathan presents a special case. Like so many others, he did not do well academically in his first year—particularly the first semester. I am not sure what all the factors were, but I am aware that he was facing considerable challenges in his personal life at the time. The key thing is his extraordinary – one might say meteoric -- academic rise in his second year. Mr. Thomas rose from a GPA in the bottom ten percent of his class to a GPA at around the top quarter of the class! That sort of resiliency ("grit", I think they call it) --the ability to rise from a setback or adversity – says a whole lot about a person. In my years teaching here at Washington and Lee, I've only seen a handful of other students make that sort of improvement in a single semester. All of them have gone on to become superlative lawyers.

I met with Jonathan several times during this process of self-improvement and can honestly say that he exhibited superb self-awareness, resolve , and execution. He is simultaneously realistic and aspirational. The outstanding results speak for themselves..

In short, Jonathan has the grit, determination, intelligence, writing skills, analytic ability, and character to be a fantastic clerk. One other thing I will say: Jonathan is the sort of person who will value and cherish the guidance and insight provided by a more senior mentor. That is also, in my view, one of the measures of successful clerkship.

Please let me know if there is any other context or information that I could supply in connection with Jonathan's clerkship application.

Sincerely,

David Eggert
Professor of Practice

David Eggert - eggertd@wlu.edu - 540-458-8335



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May 30, 2023

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RE: **Recommendation Letter for Jonathan Thomas**

Dear Sir or Madam:

It is my privilege to write this letter of recommendation in support of Jonathan Thomas. I have been practicing family law, mediation and collaborative law over the years since I graduated from Washington & Lee Law School in 1970. I have also been teaching as an adjunct professor at Washington & Lee Law School Negotiation and Conflict Resolution Skills for over 17 years and over the last several years have had the opportunity to teach approximately 80 students a year in my practicum course in Negotiation and Conflict Resolution Skills. Of the many students that I have taught over the years, Jonathan Thomas stands out as one of the best students that I have had the pleasure to teach based on his intelligence, hard work and demonstrated skills. In addition, Mr. Thomas is a wonderful person to work with, as he assisted me in my classes by joining me in Fish Bowl demonstrations to help the new students better understand the negotiation process. I am confident that Mr. Thomas will have a very successful legal career and will be positive influence in his community and in general to society because of the type of person he is and his abilities.

My course is very interactive with students performing many different negotiation and conflict resolution role plays and demonstrations and Jonathan, when he was my student, performed all of the interactive assignments, and the written analysis of such assignments, in a high quality manner.

For each of my classes, I pick a few former students to perform various demonstrations for my classes in order to help the current students learn how to be more effective negotiators and how to develop better effective conflict resolution skills. Mr. Thomas has served in that capacity this year for my classes a number of times and has been one of the best former students that I have ever used in this capacity in the various demonstrations he has done with other former students in my class. He is not only very skilled in his role in these demonstrations, but also quite frankly has great acting abilities, during which he is able to demonstrate his wonderful personality, charm, great sense of humor and knowledge.

In conclusion, if I were looking to hire an associate attorney at this time, Jonathan Thomas would be at the top of the list. I am certain that should you hire him, that he

Business Formation and Transition • Complex Litigation • Construction Law • Employment Law
Corporate and Commercial Real Estate • Creditor's Rights and Bankruptcy • Taxation, Wills and Trusts

would make an excellent employee and that you would enjoy working with him in the same manner that I have. I therefore recommend him to you without any reservation.

Should you have any questions about Mr. Thomas, please do not hesitate to contact me at fmorrison@pldrlaw.com or on my cell phone, 434-907-4805.

With kindest, personal regards, I am

Yours very truly,



Frank West Morrison

FWM/jls
Enc.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

COMMONWEALTH OF VIRGINIA)	
)	
v.)	
)	Case Nos:
)	
JOHN DOE)	
)	
Defendant.)	

Defendant’s Motion in Limine to Bar Testimony of the Defendant’s Ambiguous Head Nod and Silence in the Face of Police Accusation

Defendant John Doe, by counsel, respectfully requests that this court exclude the testimony of the Commonwealth’s police witness concerning the Defendant’s ambiguous silent reaction to an accusation by the officer, pursuant to Virginia Rule of Evidence 2.403 as well as the Fifth Amendment to the United States Constitution.

FACTUAL BACKGROUND

Defendant’s ex-wife was found dead in her home. For no stated reason, the police became suspicious of Defendant before the investigation began in earnest. Within hours of discovering the body, a detective went to Defendant’s home to inform him of the death as well as to question him. Upon arrival, the detective informed Defendant that his ex-wife had been murdered and that the police already suspected him to be the culprit. The Government now wishes to have that officer testify that after he said this, the defendant nodded his head and looked down before asking for an attorney before he would answer questions. The government intends to use his silent reaction against him to lead the jury to infer that his emotional body language was actually an unemotional nod that affirmed his knowledge and guilt of his ex-wife’s murder.

Jonathan W.E. Thomas

ARGUMENT

- 1. Testimony about Defendant's head nod should be barred because its meaning is too speculative and ambiguous to be relevant, it would confuse and mislead the jury, it would unfairly prejudice Defendant, and it would violate his Fifth Amendment rights.**

- A. The nod is so speculative and ambiguous that it has no true relevance and would only confuse the jury.**

The testimony the Government seeks to offer regarding Defendant's head nod is so ambiguous that the jury would be forced to speculate on its meaning. Defendant's head nod could have had any number of meanings from which inferences supporting guilt are not more likely than inferences supporting innocence. Therefore, it would be error to allow the testimony.

Courts often bar evidence that forces a jury to speculate on a party's ambiguous conduct because of its lack of relevance and tendency to confuse and mislead a jury. This is especially true in instances where speculative testimony is being presented solely to give rise to an inference of the defendant's guilt. *See Varker v. Commonwealth*, 14 Va. App. 445, 448 (1992) ("Where an inference supporting guilt is no more likely to arise from a proven fact than one favoring innocence, the inference of guilt is impermissible."). In *Varker*, the court decided the admissibility of a defendant's non-verbal head nod while police were questioning him about the alleged crime. *Id.* The court found that the defendant's head nod, among other evidence, was inadmissible because it "does not create an inference of guilt" and "[i]t was a non-verbal expression that may have indicated only an acknowledgment or understanding of the information being conveyed." *Id.*

A particularly useful example comes from *United States v. Rodriguez-Cabrera*, 35 F. Supp. 2d 181, (D.P.R. 1998). In *Rodriguez-Cabrera*, the defendant was told by agents that he was under arrest. The defendant asked, "What's this all about?" *Id.* at 6. The agents answered vaguely by saying "[i]t's about the money." *Id.* The defendant then nodded. Later he pointed to a drawer when

asked where the money was. *Id.* at 11. The *Rodriguez-Cabrera* court banned the statement under the following reasoning:

However, we do suppress the nod on the basis that its meaning is entirely too ambiguous to be admitted into evidence. While Special Agent Johnson understood the nod to mean that Rodriguez-Cabrera had knowledge of the extortion money to which he referred, this is Johnson's subjective interpretation of the nod. There are many equally plausible explanations for Rodriguez-Cabrera's nod. Rodriguez-Cabrera could have meant the nod to communicate that he would cooperate during his arrest; that he acknowledged the agents' presence; or merely that he heard what Special Agent Johnson has said in response to Rodriguez-Cabrera's question, 'what is this about?' Simply put, the meaning of the nod is ambiguous and not sufficiently reliable to be admitted in evidence as a statement by the Defendant. There is no question that the prejudice that would flow from admission of the nod substantially outweighs the probative value.

United States v. Rodriguez-Cabrera, 35 F. Supp. 2d 181, 8-9 (D.P.R. 1998)

Many other courts in Virginia and other jurisdictions refuse to admit evidence of a proven fact that could support an inference of guilt, but when the jury would have to speculate upon many possible meanings. *See Brown v. Commonwealth*, No. 1223-21-1, 2022 Va. App. LEXIS 653, at *15 (Ct. App. Dec. 20, 2022) (“[W]here the evidence leaves it indefinite which of several hypotheses is true, or establishes only some finite probability in favor of one hypothesis, such evidence cannot amount to proof, however great the probability may be.”); *see also Morton v. Commonwealth*, 13 Va. App. 6, 10 (1991) (finding that “[i]f there is other evidence of guilt,” evidence supporting an inference of guilt is admissible only if the inference, “is more likely than not to flow from the proved fact on which it is made to depend” . . . and that “if the only evidence of guilt is that which gives rise to the inference” then Virginia courts will require that “a rational relationship must exist, beyond a reasonable doubt, between the inference and the proved fact” for such evidence to be admitted); *Petrocelli v. Gallison*, 679 F.2d 286, 292 (1st Cir. 1982) (stating

that where an item is so ambiguous that “speculation is required to divine” how the jury should evaluate it, a trial judge should exclude the evidence under Fed. R. Evid. 403 on the ground that the danger of unfair prejudice from jury confusion substantially outweighed the record's probative value); *Naples v. United States*, 344 F.2d 508, 512 (D.C. Cir. 1964) (“Appellant allegedly responded to this lengthy statement either by remaining silent or by nodding his head ‘Yes.’ Either response gives little assurance that the appellant adopted, as his own admission, every detail of the statement or more particularly, that he adopted the statement that ‘he struck her.’”); *Reeves v. State*, 969 S.W. 2d 471, 492-93 (Tex. 1998) (“We agree that evidence that Reeves nodded his head at a time when Officer Lenoir was reciting distances is probative of nothing, and in fact, has little relevance. Because this testimony likewise had a tendency to mislead the jury and confuse the issues, we believe the court’s ruling in admitting the testimony was outside the zone of reasonable disagreement.”); *United States v. Wright*, 799 F.2d 423, 425 (8th Cir. 1986) (“The district court did not abuse its discretion in excluding Black’s testimony. The statement was ambiguous in that it would have required the jury to speculate as to what type of ‘content’ Gatewood allegedly gave Wright to hold.”).

In the present case, the testimony of Defendant’s head nod after being told by an officer that his ex-wife was murdered and that he was a suspect is so ambiguous that it demands speculation. There are many more probable meanings that support an inference of innocence, which flow naturally from the Defendant’s head nod, than any that support an inference of guilt. His nod could have been an acknowledgment of the information that he had just received. It could have been the reaction of a grief-stricken man, slumping his head down and looking toward the floor. It could have been a self-response to his own internal thought processes of how to handle a false claim of guilt. It could have been an indication of willingness to cooperate with police

questioning. It could have meant any number of things supporting an inference of innocence, but it has the inherent danger of leading the jury to infer that it was an admission of guilt when offered by the prosecution. The government is offering the testimony in order for the jury's necessary speculation to lead them to an inference of Defendant's guilt. There is no other relevant purpose for its admission. Such testimony serves only to confuse and mislead the jury creating severely unfair prejudice to Defendant. Therefore, this Court should bar its admission.

B. In addition to being highly speculative, the testimony will mislead the jury into weighing it too heavily.

Not only is the meaning of Defendant's head nod too speculative and ambiguous to be reliable or have any real relevance, the jury is also likely to give it too much weight.

Juries tend to place an extremely high weight on testimony of confessions and admissions of guilt, whether explicit or implicit. *Bruton v. United States*, 391 U.S. 123, 128-29 (1968). In *Bruton*, the Supreme Court found that testimony constituting an inadmissible confession is particularly damaging in the following statement:

[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Id. at 28-29.

The government is attempting to pass off Defendant's ambiguous reaction as an admission or confession of some sort. Such evidence of guilt or liability is considered to be so damning that courts are loath to admit the evidence unless it is extremely clear that the party intended to convey the meaning being asserted by the opposition, and that it was reliable. *See Stubblefield v. Suzuki Motor Corp. of Am.*, No.: 3:15-CV-18-HTW-LRA, 2018 U.S. Dist. LEXIS 168642, at *10 (S.D.

Miss. Sep. 29, 2018) (finding that testimony that the plaintiff had made hand gestures while semi-conscious in the hospital after a wreck which were claimed to be mimicking attempts to apply front hand-brakes was unfairly prejudicial under Fed. R. Ev. 403 because the jury would be likely to find the defendant liable “without benefit of the remainder of the evidence”), *aff’d*, 826 F. App’x, 309 (5th Cir. 2020).

While courts sometimes allow evidence of a defendant’s actions both before and after an alleged crime, the party offering that evidence “shall not attribute wrongful motivation or guilt to such action.” *See Prescott v. R&L Carriers, Inc.*, No. 3:11-203, 2013 U.S. Dist. LEXIS 5706, at *13 (W.D. Pa. Jan 15, 2013). The *Prescott* court found that a defendant’s act of leaving a scene of an alleged wrong could not be characterized as a display of guilt or liability. The court said that “[s]uch a characterization of Mead’s actions would be unfairly prejudicial, substantially outweighing any probative value.” *Id.* at 13. Though the government here is not directly characterizing Defendant’s actions as an admission of guilt, the only relevant purpose for presenting testimony of Defendant’s ambiguous conduct is to imply proof of his guilt. This makes the evidence itself a characterization of his emotional response. Such evidence has no probative value that is not outweighed by the enormous impact that an alleged admission of guilt that a police officer observed would have upon a jury.

C. Allowing the officer’s inadmissible testimony would unfairly prejudice Defendant’s presentation of his case beyond the harm of misleading the jury with speculation.

In *Arizona v. Fulminate*, 499 U.S. 279 (1991), the Supreme Court found that the prejudicial effect of evidence goes beyond the jury’s consideration of the evidence itself when its admission can cause a party to unfavorably change the presentation of their case in response to it. *Id.* at 39-40. The *Fulminate* court ruled on the application of harmless error to the admission of a coerced

confession. *Id.* In finding that the admission of the confession was not harmless, the court noted that the dangers of a defendant's alleged admissions of guilt are not limited to the weight and relevance that a jury is likely to give them. *See id.* at 39-40. The Supreme Court noted the impact that admission of such testimony had on the case as a whole, and the court especially observed that one of the prejudicial effects of admitting the testimony was that it led "to the admission of other evidence prejudicial to [the defendant]." *See id.* at 39. The *Fulminate* court noted that, "had the confession not been admitted, there would have been no reason for Sarivola [a witness for the defendant] to testify." *See id.* at 40. Allowing the government's evidence forced the defendant to bring a witness to testify against it. Putting the witness on the stand allowed the government to present evidence that the witness had ties to organized crime. *See id.* at 39. The court found that, "[a]bsent the confession, this evidence would have had no relevance and would have been inadmissible at trial." *Id.* The government argued that the evidence reflected upon the character of the witness and not the defendant, but the court refuted that and found that it "cannot agree that the evidence did not reflect on [the defendant's] character as well, for it depicted him as someone who willingly sought out the company of criminals." *See id.* at 40. The court held that "[i]t is quite possible that this evidence led the jury to view [the defendant] as capable of murder." *Id.*

Virginia courts have also noted the dangers of allowing inadmissible testimony that could force the defendant to give up his right not to testify. *See, e.g., Taylor v. Commonwealth*, 26 Va. App. 485, 19-20 (1998) ("To allow the Commonwealth to prove that the appellant admitted his guilt by remaining silent in response to police questions effectively burdened the appellant's trial

right not to testify because of the adverse inference that would be drawn from his failure to respond to the prosecution's evidence of his silence.")

In this case, Defendant would likely have to take the stand to convince the jury that his emotional reaction was not an admission of guilt. Difficult decisions must be made in the effort for a just outcome, and defendants must often decide whether to take the stand in order to mitigate damaging evidence. However, just as it was for Fulminante's witness, "there would have been no reason" for our defendant to testify if the inadmissible testimony is not allowed. *See Arizona v. Fulminate*, 499 U.S. 279, 40 (1991). If forced to take the stand to explain this inadmissible testimony, Defendant could potentially face even further unforeseen prejudice. This could also create a worse situation than the one the *Fulminate* court noted as contributing to unfair prejudice since Defendant himself would be forced to testify. The prejudice he could experience throughout the trial from the admission of inadmissible testimony may have an exponential impact, far beyond the already unfair prejudice it creates on its own.

D. Admitting the testimony of Defendant's silent reaction would use his silence against him and would violate the Fifth Amendment.

Admitting this testimony would negatively affect the defendant's right to silence. A characterization of the defendant's silence in the presence of an officer amounts to a violation of the defendant's constitutional protections against self-incrimination. In *United States v. Velarde-Gomez*, the Ninth Circuit held that, "[w]hether the government argues that a defendant remained silent or describes the defendant's state of silence, the practical effect is the same -- the defendant's right to remain silent is used against him at trial. To hold otherwise would circumvent the constitutional protection against self-incrimination." 269 F.3d 1023, 20-21 (9th Cir. 2001). *See also United States v. Whitehead*, 200 F.3d 634, (9th Cir. 2000) (ruling that the government may

not comment on post-arrest silence because such comments would constitute a penalty on the right to remain silent).

While these and many other cases generally involve silence that was observed after an individual was taken into custody, in *Taylor v. Commonwealth*, 26 Va. App. 485 (1998), the court of appeals determined that the use of pre-custodial silence could have the same effect:

The issue here is whether the Fifth Amendment affords any protection to an individual who is not compelled to testify or speak from having the person's exercise of his fundamental right to remain silent from being used in a judicial proceeding as an admission of guilt. In other words, do the constitutional privileges against self-incrimination protect a defendant's *pre-custodial silence* in response to police questioning from being introduced as *substantive evidence* of guilt in the government's case-in-chief.

Taylor v. Commonwealth, 26 Va. App. 485, 6 (1998).

The *Taylor* court concluded that testimony of pre-custodial silence should be barred for much the same reasons as the use of custodial silence is prohibited:

[T]o permit the Commonwealth to prove that the appellant tacitly admitted his guilt by remaining silent is tantamount to allowing the Commonwealth to derive an involuntary admission of guilt from the appellant. To accord a suspect less protection where he exercises the basic and fundamental right to not speak in response to non-custodial questions, when the constitutions protect the right to remain silent in a custodial situation, would be illogical. By allowing the jury to decide that the appellant's silence was an admission of guilt, the Commonwealth, in effect, "compelled" him to provide incriminating testimony at trial. When the appellant remained silent and did not speak to Deputy Inge or testify at trial, the Commonwealth was allowed to prove that he nonetheless admitted ownership of the handgun. We can think of few other techniques that would bring to bear this degree of direct compulsion on a criminal defendant to "speak his guilt" before the jury.

See Taylor, 26 Va. App. at 20 (internal citations and quotations omitted).

The speculative nature of the evidence in this case would allow “the jury to decide that the appellant’s silence was an admission of guilt.” *See id.* This amounts to compelling the defendant to provide incriminating testimony at trial. For this independent reason, the Court should bar the testimony.

CONCLUSION

Testimony regarding Defendant’s head nod is so ambiguous that it demands speculation by the jury in order to assign it meaning. The only relevant purpose of this evidence is to lead the jury to an inference of Defendant’s guilt. For the reasons cited above, such evidence would mislead the jury, would cause significant unfair prejudice to the defendant, and has no probative value. Furthermore, the admission of this evidence would violate the defendant’s Fifth Amendment rights, just as in *Taylor v. Commonwealth*. For these reasons, the defendant respectfully requests that this Court grant the motion and exclude the evidence pursuant to Virginia Rule of Evidence 2.403 as well as the Fifth Amendment to the United States Constitution.

Respectfully submitted

/s/ Jonathan W.E. Thomas
COUNSEL FOR DEFENDANT

Applicant Details

First Name **Nicholas**
 Last Name **Tramosch**
 Citizenship Status **U. S. Citizen**
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 Address

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Deer Park
State/Territory
New York
Zip
11729
Country
United States

Contact Phone Number **(631) 681-0959**

Applicant Education

BA/BS From **Syracuse University**
 Date of BA/BS **May 2021**
 JD/LLB From **Hofstra University School of Law**
<http://law.hofstra.edu/home/index.html>
 Date of JD/LLB **May 20, 2024**
 Class Rank **5%**
 Law Review/Journal **Yes**
 Journal(s) **Hofstra Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Hofstra Moot Court Board**
Hofstra Moot Court Interscholastic Team

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Greenwood, Daniel
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Dunbrook, Tracy
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516-463-7302

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nicholas E. Tramposch

77 Ellensue Drive, Deer Park, NY 11729 | ntramposch1@pride.hofstra.edu | (631) 681-0959

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my sincere interest in a judicial clerkship position in your chambers. As a rising third-year student at the Maurice A. Deane School of Law at Hofstra University, graduating in May 2024, I am eager to apply my legal writing, research, and analytical skills in service of the federal judiciary. I present herein my academic record, practical legal experience, and demonstrated ability to excel in challenging roles in hopes of encouraging your consideration of my candidacy.

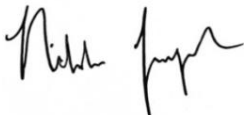
I rank in the top 1.8% of my law class with a 3.87 GPA and serve as an Articles Editor for the *Hofstra Law Review*. Additionally, I have earned CALI Excellence for the Future Awards for achieving the highest scores in Torts, Property, Business Organizations, Health Law, and Biotechnology: Law, Regulation, and Ethics. This spring, I won an interscholastic moot court competition: the ABA National Appellate Advocacy Competition, Brooklyn Regional. I am a skilled legal writer and oral advocate and would be honored to apply these skills to the critical work of your chambers as a clerk.

My legal experience has proven particularly formative. I have honed my legal research and writing skills as a judicial intern to the Honorable James Wicks and the Honorable Joanna Seybert, both of the Eastern District of New York, and as a Research and Teacher's Assistant to Professors Jennifer Gundlach, Daniel Greenwood, and Ashira Ostrow. This summer, I will continue to enhance my skill set and deepen my knowledge of the practice of law as a Summer Associate in the Litigation Group at Paul, Weiss, Rifkind, Wharton & Garrison LLP. I look forward to viewing the litigation process from a firm perspective and sharpening my practical skills.

Beyond the classroom, my tenure as President of the Business Law Society and TAMID Consulting at Syracuse University, as well as my work with Tel Aviv-based startups, reflect my leadership and problem-solving capabilities. I am convinced that the combination of my academic record and practical legal experience will allow me to contribute positively to your chambers.

Since my first exposure to the federal court system last summer, I possess complete confidence that I seek to embark on my legal career supporting the federal bench as clerk, and each decision I have made during law school has been with that goal in mind. It would be an honor to do so under your mentorship. Thank you for considering my application. I would welcome the opportunity to further discuss my qualifications with you.

Respectfully,



Nicholas Tramposch

Nicholas E. Tramposch

77 Ellensue Drive, Deer Park, NY 11729 | ntramposch1@pride.hofstra.edu | (631) 681-0959

EDUCATION

Maurice A. Deane School of Law at Hofstra University, Hempstead, NY

Juris Doctor Candidate, May 2024

GPA: 3.87; Rank: 5 of 281 (Top 1.8%)

Honors: *Hofstra Law Review*, Articles Editor, Vol. 52; Dean's List (4 semesters); CALI Excellence for the Future Award (highest scoring student) in Torts, Property, and Business Organizations, Health Law, and Biotechnology: Law, Ethics, and Regulation; Champion, ABA National Appellate Advocacy Competition, Brooklyn Regional

Activities: *Pro Se* Legal Assistance Clinic (anticipated Fall 2023); President, Business Law Society; Vice President, Hofstra Dispute Resolution Society; Moot Court Board

Syracuse University, Syracuse, NY

Bachelor of Science in Biotechnology, Bachelor of Science in Finance, *magna cum laude*, May 2021

GPA: 3.73

Honors: Coronat Full Tuition Academic Scholarship (top 15 admitted students); Dean's List (8 semesters); Special Achievement in Biotechnology Award

Activities: Biotechnology Sector Specialist, Investment Club; Molecular Biotechnology Researcher

LEGAL EXPERIENCE

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY

Summer Associate, Litigation, May 2023 – Present

Draft legal memoranda, attend discovery conferences, and participate in strategy meetings for matters.

Maurice A. Deane School of Law at Hofstra University, Hempstead, NY

Research Assistant and Teacher's Assistant, January 2022 – Present

Research metacognitive learning strategies and regulation pertaining to Civil Procedure and bar passage rates for Professor Jennifer Gundlach. Draft manual to be included in Cases and Materials for Land Use, 8th Edition for Professor Ashira Ostrow. Teach tort law review sessions to first-year students for Professor Greenwood.

United States District Court for the Eastern District of New York, Central Islip, NY

Judicial Intern to the Honorable James Wicks, September 2022 – December 2022

Drafted summary judgment orders, reports, and recommendations. Wrote bench memoranda for status conferences, preliminary conferences, and oral arguments. Attended various court and trial proceedings.

United States District Court for the Eastern District of New York, Central Islip, NY

Judicial Intern to the Honorable Joanna Seybert, June 2022 – August 2022

Researched and analyzed claims. Drafted bench memoranda and analysis in preparation for motions. Reviewed briefs and motions. Drafted summary judgment orders.

Andruzzi Law Esq., Bethpage, NY

Paralegal, June 2021 – September 2021

Drafted discovery requests and responses, motions to compel, summonses, affidavits, and complaints. Conducted legal research, composed legal memoranda, and engaged clients to address concerns and provide case updates.

OTHER EXPERIENCE

TAMID Consulting at Syracuse University, Syracuse, NY

President, November 2018 – January 2021

Oversaw 12 consulting projects with Tel Aviv-based startups. Created 10 stock pitches on Israeli cloud computing, artificial intelligence, and technology firms for the TAMID national portfolio.

Neuro-Biomorphic Engineering Lab, Tel Aviv, Israel

Business Development Consultant, May 2020 – August 2020

Conducted due diligence market and patent research for a novel rehabilitative robotic arm.


INTERESTS

Skiing; volunteering and service; professional wedding photography; classical violin; former Eagle Scout




Page: 1

Course Level: Law

HOFSTRA UNIVERSITY					HOFSTRA UNIVERSITY				
Student No: 702282192					Date Issued: 09-JUN-2023				
Record of: Nicholas Tramosch					Page: 2				
MAURICE A. DEANE SCHOOL OF LAW 121 Hofstra University Hempstead, New York 11549-1210									
SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R	SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R
Institution Information continued:					Fall Semester 2023				
LAW	2520	EXTERNSHIP SEMINAR, JUDICIAL	1.00 A	4.00	IN PROGRESS WORK				
LAW	2758	ADVANCED COMPETITION SKILLS	1.00 P	0.00	LAW	2741	LGL SKILLS UNDR REP FED LITIGNT	2.00	IN PROGRESS
LAW	2861	HOFSTRA LAW REVIEW	2.00 P	0.00	LAW	2742	PRO SE LGL ASST PRG FLD PLCMNT	2.00	IN PROGRESS
LAW	3200	FOUNDATIONAL LAWYERING SKILLS	3.00 A-	11.01	LAW	3734	LGL & BIOETH RSP HLTHCRE CHLNG	3.00	IN PROGRESS
LAW	3761	CONSTITUTIONAL LAW II	3.00 A	12.00	LAW	3794	BANKRUPTCY	3.00	IN PROGRESS
LAW	3828	EXTERNSHIP, JUDICIAL	2.00 P	0.00	LAW	4751	CRIMINAL PROCEDURE I	4.00	IN PROGRESS
LAW	4701	BUSINESS ORGANIZATIONS	4.00 A+	16.00	In Progress Credits 14.00				
Ehrs: 16.00 GPA-Hrs: 11.00 QPts: 43.01 GPA: 3.91					***** TRANSCRIPT TOTALS *****				
Spring Semester 2023					*****				
Rank: 5 of 281					Earned Hrs GPA Hrs Points GPA				
LAW	2758	ADVANCED COMPETITION SKILLS	1.00 P	0.00	TOTAL INSTITUTION 64.00 52.00 201.73 3.87				
LAW	2861	HOFSTRA LAW REVIEW	2.00 P	0.00	TOTAL TRANSFER 0.00 0.00 0.00 0.00				
LAW	2921	PATENT LAW	2.00 A-	7.34	OVERALL 64.00 52.00 201.73 3.87				
LAW	3733	BIOTECH: LAW, REGLTN & ETHICS	3.00 A+	12.00	***** END OF TRANSCRIPT *****				
LAW	3844	HEALTH LAW	3.00 A+	12.00					
LAW	4761	EVIDENCE	4.00 A	16.00					
Ehrs: 15.00 GPA-Hrs: 12.00 QPts: 47.34 GPA: 3.94									
***** CONTINUED ON NEXT COLUMN *****									

THE WORD VOID APPEARS WHEN PHOTOCOPIED





Brian T. Kaspar
Associate Dean for Academic Records & Registrar-Law

TRANSCRIPT GUIDE PRINTED ON REVERSE

SYRACUSE UNIVERSITY

Office of the Registrar

Academic Transcript

Tramosch, Nicholas E		75222-7584	Transcript Print Date: 01/18/2022								
Undergraduate Record											
Dual The College of Arts and Sciences and Whitman School of Management											
Major: Biotechnology											
Major: Finance											
Degree Awarded: Bachelor of Science Award Date: 05/23/2021 Honors: Magna Cum Laude											
OTHER CREDIT											
AP	Biology	4.000									
AP	Chemistry	5.000									
AP	Mathematics - Calculus BC	8.000									
AP	Physics C (Electr & Magnetism)	4.000									
AP	Physics C (Mechanics)	4.000									
AP	Spanish Language	4.000									
MILESTONES											
Whitman Internship		Completed	10/11/2019								
Whitman Community Engagement		Completed	05/21/2021								
<table border="0"> <tr> <td> Fall 2017-Dual Arts & Sci/Management Cell Biology BIO327 3.0 A Environment and Society GEO103 3.0 B+ Honors Orientation Seminar HNR100 1.0 A Foundatns Human Behavior PSY205 3.0 A Perspectives of Business/Mgmt SOM122 3.0 A Academic Writing (Honors) (HNR) WRT109 3.0 B+ Attempted: 16.0 Earned: 16.0 GrPts: 59.9980 GPA: 3.750 </td> <td> Fall 2019-Dual Arts & Sci/Management Biomaterials & Medical Devices BEN468 3.0 A Research in Biology BIO460 2.0 B Molecular Biotechnology BIO463 4.0 B+ Principles of Finance FIN256 3.0 A Structures and Innovation HNR360 3.0 A Principles of Marketing MAR255 3.0 A- Intro to SCM SCM265 3.0 B+ Attempted: 21.0 Earned: 21.0 GrPts: 76.3320 GPA: 3.635 </td> </tr> <tr> <td> Spring 2018-Dual Arts & Sci/Management Genetics BIO326 3.0 A- General Chemistry Lecture II CHE116 3.0 A Economic Ideas & Issues ECN203 3.0 A Folk Arts & Oral Trad of India HNR360 3.0 A Intro to the Legal System LPP255 3.0 A- Intro. Statistics for Mngmt. MAS261 3.0 B+ Attempted: 18.0 Earned: 18.0 GrPts: 68.0010 GPA: 3.778 </td> <td> Spring 2020-Dual Arts & Sci/Management Applied Biotechnology BIO464 4.0 P* Organic Chemistry II CHE325 3.0 B+ Organic Chemistry II Lab CHE326 2.0 A- Financial Management FIN345 3.0 B- Investments FIN346 3.0 A- Intro Philosophy/Honors (HNR) PHI109 3.0 A Attempted: 18.0 Earned: 18.0 GrPts: 48.3350 GPA: 3.453 </td> </tr> <tr> <td> Fall 2018-Dual Arts & Sci/Management Intro. to Financial Accounting ACC151 4.0 A- Business Analytics for Mgt Dec BUA345 3.0 A Organic Chemistry I CHE275 3.0 A Organic Chemistry I Laboratory CHE276 2.0 A Intro To EEE EEE370 3.0 A Studio 2:Critical Research WRT205 3.0 A- Attempted: 18.0 Earned: 18.0 GrPts: 69.6690 GPA: 3.871 </td> <td> Fall 2020-Dual Arts & Sci/Management Biochemistry I BCM475 3.0 A- Water & Our Environment EAR205 3.0 A Internatl Financial Manag FIN457 3.0 B+ Social & Political Philosophy PHI175 3.0 A Human Nature PHI197 3.0 A Adv Studio: Professional Wrtnng WRT307 3.0 A Attempted: 18.0 Earned: 18.0 GrPts: 69.0000 GPA: 3.833 </td> </tr> <tr> <td> Spring 2019-Dual Arts & Sci/Management Intro to Managerial Acc ACC252 3.0 A Integrative Biology Laboratory BIO305 3.0 B+ Intermediate Microeconomics ECN301 3.0 A Intro to Strategic Mngmt MGT247 3.0 A- Managing and Leading People MGT248 3.0 A- Managing in a Global Setting SOM354 3.0 A Attempted: 18.0 Earned: 18.0 GrPts: 68.0010 GPA: 3.778 </td> <td> Spring 2021-Dual Arts & Sci/Management Capstone Sem in Biotechnology BIO421 3.0 A Stratgc&Entrepren'L Mngmt EEE457 3.0 B+ Hedge Funds FIN400 3.0 A- Financial Analytics FIN454 3.0 A- Attempted: 12.0 Earned: 12.0 GrPts: 44.0010 GPA: 3.667 </td> </tr> </table>				Fall 2017-Dual Arts & Sci/Management Cell Biology BIO327 3.0 A Environment and Society GEO103 3.0 B+ Honors Orientation Seminar HNR100 1.0 A Foundatns Human Behavior PSY205 3.0 A Perspectives of Business/Mgmt SOM122 3.0 A Academic Writing (Honors) (HNR) WRT109 3.0 B+ Attempted: 16.0 Earned: 16.0 GrPts: 59.9980 GPA: 3.750	Fall 2019-Dual Arts & Sci/Management Biomaterials & Medical Devices BEN468 3.0 A Research in Biology BIO460 2.0 B Molecular Biotechnology BIO463 4.0 B+ Principles of Finance FIN256 3.0 A Structures and Innovation HNR360 3.0 A Principles of Marketing MAR255 3.0 A- Intro to SCM SCM265 3.0 B+ Attempted: 21.0 Earned: 21.0 GrPts: 76.3320 GPA: 3.635	Spring 2018-Dual Arts & Sci/Management Genetics BIO326 3.0 A- General Chemistry Lecture II CHE116 3.0 A Economic Ideas & Issues ECN203 3.0 A Folk Arts & Oral Trad of India HNR360 3.0 A Intro to the Legal System LPP255 3.0 A- Intro. 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Continued on next column		** Undergraduate Record Credit Summary ** Total Units Earned: 168.000 GPA Credits: 135.0 Transfer Credit: 0.000 Grade Points: 503.3370 Other Credit: 29.000 Cumulative GPA: 3.728 End of Undergraduate Record End of complete transcript record									
The Official transcript paper version is printed on security paper. The Official e-Transcript is delivered as a secured PDF document that certifies the authenticity. The University Registrar's signature and Syracuse University seal appear on the right. The Official transcript may not be released without the written consent of the student.		  University Registrar									

SYRACUSE UNIVERSITY, Transcript Office, 109 Steele Hall, Syracuse, New York 13244-1120 (315) 443-2422

OFFICIAL TRANSCRIPTS: Transcripts are prepared by the Registrar's Office in accordance with policies of the American Association of Collegiate Registrars and Admissions Officers. Transcripts show only those credits earned at Syracuse University and those credits transferred from other institutions that are applied to the Syracuse degree program. Official transcripts are imprinted with the seal of the University and the signature of the University Registrar. A raised seal is not required. Without the seal and signature, this document is not an official transcript.

GRADE REPORTS: Grade reports show only courses and grades for a specific semester. Grade reports may also be used as supplements to transcripts which were previously requested by the student. Official grade reports also are imprinted with the seal of the University and the signature of the University Registrar.

3rd PARTY RELEASE OF A TRANSCRIPT OR GRADE REPORT: This transcript or grade report has been forwarded to you with the understanding that it will not be released to other parties. The federal Family Educational Rights and Privacy Act of 1974 prohibits release of this information without the student's written consent. Please return the transcript to Syracuse University if you are unable to comply with this condition.

DEGREES AND HONORS: Degree completion is signified on the transcript by an award date printed next to the degree name. **UNDERGRADUATE PROGRAM HONORS**, designated by the notation "HON" printed after the major, indicates that the student was part of the Honors Program and received honors in that field. **UNDERGRADUATE DEPARTMENTAL DISTINCTION**, designated by the notation "DPT" printed after the major, indicates that the student received distinction in that field. **UNDERGRADUATE UNIVERSITY HONORS** are awarded upon degree certification to students earning a superior cumulative GPA: Cum Laude, GPA 3.2 to 3.49 (Architecture), 3.4 to 3.59 (all other); Magna Cum Laude, GPA 3.5 to 3.79 (Architecture), 3.6 to 3.79 (all other); Summa Cum Laude GPA 3.8 to 4.0 (all schools). These designations appear next to the degree award date.

COURSE NUMBERING SYSTEM: Effective September 1968: **001-099:** When the semester heading reads "Semester Abroad", these are credit-bearing courses taken through the Syracuse University Abroad program. Under all other semester headings, these are remedial and non-credit courses; **100-199:** freshman level; **200-299:** sophomore level; **300-499:** junior and senior level; **500-599:** joint undergraduate and graduate; **600-699:** first-year graduate level; **700-899:** second and third-year graduate level; **900-996:** readings, research, and individual study courses at the doctoral level only; **997:** master's thesis; **998:** individual study at the graduate level; **999:** doctoral dissertation. Prior to September 1968, the course numbering system was **000-099:** lower division undergraduate; **100-199:** upper division undergraduate; **200-299:** joint undergraduate and graduate; **300-399:** graduate.

CREDIT: A unit of credit is represented by the semester hour, which stands for one class period of fifty (50) minutes in length for fifteen (15) weeks or the equivalent.

GRADE POINT AVERAGE: The grade point average (GPA) is calculated by dividing the number of grade points earned by the number of credits attempted.

GRADE	GRADE POINTS PER CREDIT
A	4.0
A-	3.6666
B+	3.3333
B	3.0
B-	2.6666
C+	2.3333
C	2.0
C-	1.6666
D (Undergraduate & Law only)	1.0
D- (Law only)	.6666
F	0

OTHER GRADING SYMBOLS	MEANING	GRADE POINTS PER CREDIT
AU	Audit	Not counted
H	Honors (Law only)	Not counted
HH	High Honors (Law only)	Not counted
I	Incomplete	0
I+default grade	Incomplete with default grade	As default grade
NA	Did not attend	Not counted
NG	No Grade	Not counted
NR	Not required	Not counted
P, P*	Passing	Not counted
RM	Remedial	Not counted
V	Variable length course – grade not yet due	Not counted
WD	Withdrew	Not counted

Prior to January 1981, NA's counted as F's. Prior to August 2017 NA indicated Did not attend/withdraw. Obsolete symbols that may appear on older transcripts include **NC** (no credit, not counted for GPA); **S** (satisfactory, not counted); **U** (unsatisfactory, 0 points); **WF** (withdrew failing, 0 points); and **WP** (withdrew passing, not counted). As of September 1987, the grading system was expanded to include plus (+) and minus (-) grades as shown above for all non-Law courses. P* is used to indicate exceptional circumstances, allowed only in specific academic terms identified by the University, and counts as a Pass (P).

SPECIAL CODES	DESCRIPTION
(ar)	Course credit is not included in Units Earned or GPA Credits and grade points are not included in GPA calculation, in accordance with Academic Renewal policy.
(g)	This is a graduate level course taken by an undergraduate who has not been admitted to a graduate program at SU. It is not used to fulfill undergraduate degree requirements. The course credits count towards units earned, GPA credits, and the grade points are included in the GPA calculation.
(gn)	This is a graduate level course taken by an undergraduate admitted to a graduate program at SU. It is not used to fulfill undergraduate degree requirements and the credits may be transferred into the graduate record. On the undergraduate record, course credit is not included in Units Earned or GPA credits and grade points are not included in GPA calculations.
(n)	Course credit is not included in Units Earned or GPA Credits and grade points are not included in GPA calculations.
(r)	This is a retaken course and the credits and grade points are included in all calculations.
(un)	This is an undergraduate course taken by a graduate student. It does not count towards a graduate degree.
(HNR)	This is an Honors section of the course.
(X)	The F grade on this class is the result of a violation of the Academic Integrity Policy.

ENGINEERING AND COMPUTER SCIENCE COOPERATIVE EDUCATION PROGRAM consists of work experience in several segments, represented on the transcript as ECS 370/470/570, Professional Practice. A minimum of two work segments satisfy program requirements.

COLLEGE OF LAW: Prior to September 1999, Law courses could be given plus (+) grades. A grade of 'B+' earned 3.5 grade points per credit and a 'C+' earned 2.5 grade points per credit. As of September 1999 Law courses follow the plus/minus (+/-) grade system shown above. As of fall 2011, Law grading system expanded to include D-.

College of Law students are ranked each semester and the class rank is displayed below the semester statistics. College of Law also places students with an appropriately high semester GPA on the Dean's List. This designation is displayed below the statistics for the semester.

COLLEGE OF LAW HONORS: Summa Cum Laude, GPA 3.55 and above; Magna Cum Laude, GPA 3.35 to 3.54; Cum Laude, GPA 3.00 to 3.34. The requisite minimum honors grade point average may have been increased in any year to assure that not more than 2% of any graduating class graduated summa cum laude, not more than 10% of any graduating class graduated either summa cum laude or magna cum laude, and not more than 25% of any graduating class graduated with honors. In calculating graduation honors, grade point averages at the College of Law are rounded to the nearest hundredth.

[REGTRNLEG 09082021]



Daniel J.H. Greenwood
Professor of Law

108 Law School
121 Hofstra University cell: 801-755-7607
Hempstead, NY 11549 Daniel.Greenwood@hofstra.edu

June 6, 2023

Dear Judge:

I write to recommend Nicholas Tramposch for a position as your law clerk.

Mr. Tramposch was a student in my Torts and Business Organizations classes, as well as my teaching assistant in Torts and research assistant. In each of the positions, he excelled.

I teach both Torts and Business Organizations at a high conceptual level – we focus not only on the black letter doctrine and rules, but on the justice, economic, planning and regulatory issues that underlie them, including active controversies and ongoing debates as much as settled law. Successful students come away with an understanding of not only the rules themselves and the policies underlying them but how economic actors can respond to legal rules and how regulators can respond to those responses.

Mr. Tramposch is among the very best students I have had the privilege of teaching at Hofstra.

In Torts, his A+ was earned by the highest score in the class on the exam. Similarly, Mr. Tramposch was highly engaged in class, often bringing his undergraduate training and common sense to add sophistication to his legal analysis and repeatedly pushing the discussion to deeper levels.

As a result of his performance, I invited Mr. Tramposch to be my course assistant the following year. In that role, he took the initiative to organize a series of discussion sessions for students, centered around a close analysis of a multiple-choice question illustrating a particular torts issue. In addition, he produced almost 50 multiple choice questions with accompanying explanations for students to use as practice and to consolidate their understanding of the course. As I edited those questions, I was impressed by the facility with which he identified core doctrinal issues and his pursuit of the relevant issues beyond the surface to examine their broader implications for the law and social regulation of behavior.

Mr. Tramposch's performance in Business Organizations was equally impressive. Again, I found that I could count on him to explain difficult points when his classmates were



struggling, and again his exam reflected his careful work and deep understanding. I hope that he will assist me again next year in this course as he did last year in torts.

Additionally, Mr. Tramposch suggested working together on an article concerning the Supreme Court's recent changes to religious rights of free exercise and disestablishment. He drafted several sections of this paper and we are currently working together to rewrite and consolidate it.

In each of these contexts, Mr. Tramposch has demonstrated a level of initiative and acumen rarely see; he gets more done on more projects than any student I've worked with for years. Similarly, he has consistently impressed me as well-spoken, organized and prepared. His writing is fundamentally clear, thoughtful and well-organized, if sometimes adjectively overrun. Already quite good, it will rapidly improve with even minimal editing.

Based on my own experience clerking in the SDNY and my opportunities to work with Mr. Tramposch, I expect that the initiative, hard work and ambition he has demonstrated so far will enable him to serve you well as a clerk and then lead him on to a distinguished career as a fine lawyer. I recommend him without qualification for your position.

If I can be of any further help, please call or email.

Sincerely,

A handwritten signature in blue ink that reads "Daniel JH Greenwood". The signature is written in a cursive, flowing style.

Daniel JH Greenwood



Jennifer A. Gundlach
*Emily and Stephen Mendel Distinguished Professor of Law
and Clinical Professor of Law*

Room 228, Law School tel: 516-463-4190
121 Hofstra University Jennifer.Gundlach@hofstra.edu
Hempstead, NY 11549

May 30, 2023

RE: Clerkship Application of Nicholas Tramposch

Dear Judge:

It gives me great pleasure to recommend Mr. Nicholas Tramposch in connection with his application for a post-graduate clerkship with you. I have taught and worked closely with him over the past two years and I can say without a doubt that he stands at the top of my list as one of the most exceptional students I have had in my 23 years of teaching. He is a truly superior candidate who would make an invaluable addition to your chambers.

Nick possesses the ideal blend of strong oral and written analytic skills, with the poise and professionalism required for a law clerk. It was my good fortune to have him as a student in Civil Procedure during his first year at the Maurice A. Deane School of Law at Hofstra University. He exhibited incredible intellectual curiosity and complex analytical thinking every time I cold-called him, as well as when he volunteered during class discussions. It came as no surprise to me when he earned one of the highest A's in my class (of which there are very few), nor that he has since earned top grades in all of his other courses as well.

I was so impressed with Nick's work ethic and the role that he played in helping his peers during my class that I asked him to serve as my Teaching Fellow, as well as my Research Assistant, the following year. In that role, he earned the respect and appreciation of the next year's Civil Procedure students as he led review sessions and created hypothetical fact patterns for students to apply what they were learning. He was also invaluable to me in my empirical research study, spending hours reviewing data and discussing them with me and my colleague. In addition, he worked meticulously to edit an article of mine for publication. That same discipline and attention to detail are what elevated him to Articles Editor of the *Hofstra Law Review* in the coming year, as he continues to adeptly juggle the responsibilities of serving on our Moot Court Board and engaging in interscholastic moot court competitions.

Nick has had remarkable exposure to federal practice during the past two years and has shown great interest in immersing himself in the community of federal practitioners. I was so impressed with him that I recommended him to the senior judge sitting in the Eastern District of New York's Central Islip courthouse, the Honorable Joanna Seybert for a judicial internship during the summer after his first year. I heard from her clerks and Judge Seybert that he was very impressive, and he found the experience so valuable that he then applied for and was accepted

Page 2
May 30, 2023

for a second judicial internship with Magistrate Judge James Wicks. And this coming fall, I look forward to having him as a student again, this time in the Hofstra Law Pro Se Legal Assistance program, a hybrid clinic in which I supervise students in providing limited scope legal assistance to self-represented litigants in EDNY civil cases. Through that position, he will have a new opportunity to see federal practice and procedure from the litigant's vantage point. I would also add that Nick regularly attends events hosted by our regional EDNY Chapter of the Federal Bar Association (for which I serve as a faculty advisor) and is always in the audience when there is something to be learned from a visiting judge or distinguished practitioner at the Law School.

Refreshingly, the depth and breadth of Nick's involvement stems from his thirst for learning and immersing himself in different areas of practice. In a sense, he is cultivating his own interdisciplinary legal education by casting a wide network and soaking up all that he can about the legal profession and the practice of law. Nick's superior performance in classes, extracurricular activities, and professional experience during law school are clear evidence of his discipline and deep engagement with the law, qualities that are essential for a trusted law clerk. Just as importantly, Nick is the kind of person who comes along once in a generation of students and who I undoubtedly will remain close to for years to come. He is mature, unassuming, compassionate, funny, and authentic – a true joy to be around. In short, I give him my highest recommendation for a clerkship position.

Warmly,

Jennifer A. Gundlach

Jennifer A. Gundlach



LAW FACULTY

121 Hofstra University
Hempstead, NY 11549

law.hofstra.edu

June 2, 2023

Dear Judge:

I write in support of Nicholas Tramposch's application for a clerkship in your chambers. I am a Special Professor of Law at Maurice A. Deane School of Law. I have known Nick since the fall of 2022, when he contacted me about taking my Biotechnology: Law, Regulation and Ethics Seminar. We spoke online and I was immediately impressed with his intelligence and enthusiasm. He was extremely knowledgeable about biotechnology as it relates to law and I could tell that he would add a great deal to our class discussions.

Nick's presence and participation in the seminar were beyond my expectations. He is an extremely considerate person and was outstanding in the quality of his contributions to the class and in his support of his classmates, especially during group assignments. I could always count on him to help out if necessary. He has a great sense of humor and at the same time, a maturity unexpected of students who have not yet embarked on their professional careers. I mention Nick's excellent character because as intelligent as he is, he does not hold himself above others and is humble and empathic.

Although I have only known Nick for one semester, he impressed me as among the top students I have taught during my career. His knowledge of the law is impressive—often in class he would contribute by citing statutes and case law related to the topic of discussion. These contributions were extremely helpful to the class, and I was impressed by his knowledge, detailed retention, and his application of the law. He is as well-versed as any student I have known in many areas of the law. His recall is outstanding but it is anything but rote—he takes legal information and applies it to problems appropriately, inventively, and creatively. I believe that as Nick develops as a scholar and as a professional he will enrich the field of law with his ideas.

Throughout the semester, we had ongoing discussions about his interest in Law and Economics. Much of our class was devoted to the application of bioethics to developments in biotechnology, as well as how the law developed in response to new technology. As the semester went on, we met on several occasions to discuss law and economics and its application to new and developing biotechnology. In our discussions, he evidenced his excellent reasoning ability and combined his theoretical skills to develop a thesis about this application. The result was an exceptionally well-written term paper where he developed his thesis evidencing not only his comprehension of difficult scientific material but his ability to take his thesis and construct viable and interesting legal arguments. I found that our discussions always brought up new and interesting questions. While always respectful, Nick often challenged assertions, arguing various ways of approaching legal issues.

Nick is extremely hardworking, energetic, generous, and creative. He enjoys being challenged intellectually and looks for opportunities to add to his knowledge of the law. I expect that he will excel in his career, and I look forward to watching him flourish. Because of all of his personal qualities, his

Page 2
June 2, 2023

intelligence, and his enthusiasm, I believe he would be an excellent clerk and offer outstanding research and writing support to your chambers. As a result of his abilities, character, and promise, I unequivocally support his application.

Please let me know if you need any additional information.

Sincerely,

A handwritten signature in black ink that reads "Tracy Dunbrook". The signature is written in a cursive, flowing style.

Tracy Dunbrook
Special Professor of Law
Maurice A. Deane School of Law
Hofstra University
tracy.a.dunbrook@hofstra.edu
917-865-1212

Nicholas E. Tramposch

77 Ellensue Drive, Deer Park, NY 11729 | ntramposch1@pride.hofstra.edu | (631) 681-0959

The enclosed writing sample is an appellate brief concerning the First Amendment rights and academic freedom of a public university professor, which I prepared in anticipation of the American Bar Association's National Appellate Advocacy Competition, Brooklyn Regional. At the competition, our team argued on behalf of both sides throughout five rounds of competition. Although our team competed together, I was responsible for briefing and arguing our second issue: this writing sample is entirely my own work product. I have omitted the table of contents, the table of authorities, the jurisdictional statement, and portions of the other sections for brevity. I would be happy to provide the full brief upon request.

No. 01–463

In the Supreme Court of the United States

JONAH SMITH,

Petitioner,

v.

ALBERT HALL, SHELIA BARRETT, AND WESTLAND
COMMUNITY COLLEGE.

Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

**BRIEF FOR THE PETITIONER
JONAH SMITH**

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ISSUE PRESENTED

Whether the First Amendment’s prohibition against compelled speech limits a public college’s power to require an experienced professor to endorse a viewpoint that conflicts with the instructor’s academic views.

STATEMENT OF THE CASE

This Court has long recognized that the First Amendment prohibits the government from compelling its citizens to speak—or remain silent. *E.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943). College classrooms are unique in offering a forum for the marketplace of ideas to flourish. At a time when education plays an increasing role in employment opportunities, “academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian v. Board of Regents*, 385 U.S. 589, 608 (1967).

This case concerns such a pall of orthodoxy arising from the disciplined attempt of a floundering public community college to conscript its faculty into making written and verbal oaths during classroom instruction. In the spring of 2019, Petitioner Jonah Smith faced a choice: he could either parrot his public employer’s institutional ideals, suppressing his personal academic beliefs, or risk losing his job and his opportunity for tenure. (Record (“R.”), at 10–11.)

In 2019, to address the school’s ongoing student recruitment and retention issues, the Westland Community College (“WCC”) administration began to develop the “New Student Experience” (“NSE”). (R., at 8–9.) The administration’s goal in promulgating the NSE curriculum was twofold: first, it sought “to expose new students to WCC campus resources, culture, and values”; second, it aimed “to increase student engagement and increase retention, particularly among traditionally underserved student populations.” (R., at 8.)

The NSE pilot program required faculty members to dictate certain statements and viewpoint, offering them neither the ability to dissent nor distance themselves from the

institution’s message. (R., at 8–9.) Jonah Smith, an experienced professor with tenure ambitions, expressed his concerns to administration over this material and his unwillingness to surrender his protected speech. (R., at 10.) In response, Albert Hall (“Hall”), Academic Dean of WCC, and Shelia Barrett (“Barrett”), Chair of the Philosophy Department, rescinded Smith’s return offer. (R., at 10.)

Hall, Barrett, and WCC (together “Respondents”) now seek refuge from Smith’s compelled speech claim under the protection of the government speech doctrine, which strips away the First Amendment’s requirement of government neutrality when the government, itself, speaks. *See, e.g., Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583, 1589 (2022). Against the great weight of this Court’s precedents supporting a professor’s unabated First Amendment rights in the classroom, the Thirteenth Circuit held that Jonah Smith’s speech fell within the purview of the government speech doctrine, thereby barring it from the First Amendment’s protections. (R., at 11.) This Court should reverse the decision of the Thirteenth Circuit and reaffirm the role of the First Amendment and academic freedom in public colleges.

STATEMENT OF FACTS

Smith’s Employment History at Westland Community College

In 2009, Jonah Smith, a PhD in philosophy, started working in the WCC Philosophy Department as an untenured professor. (R., at 4.) For a decade, Smith taught two introductory philosophy of law courses and two specialized philosophy courses. (R., at 4.) During his time at WCC, students lauded Smith’s ability to create an engaging learning environment that spurred critical thinking and rigorous discourse. (R., at 4–5.) Although not required to publish scholarly papers, Smith regularly engaged in research and scholarship during his time at WCC in the hopes that he could earn a tenured position. (R., at 5.)

February 2019 Classroom Discussion in Smith's Philosophy of Law Course

In February 2019, Smith facilitated an active class discussion in his Philosophy of Law course for his Section A students. (R., at 5.) Smith introduced a new topic: ethical legal representation, using as an example, local attorney and WCC faculty member Sally Sanders. (R., at 5.) Smith defended Sanders, who had publicly represented "disgraced businessman," Martin Michelson in a recent lawsuit (R., at 5.) In the months prior, students had coordinated protests to prevent Sanders from teaching at WCC, and many reported being victimized by Michelson. (R., at 5.) To stimulate critical thinking, Smith presented the argument that Sanders was acting ethically in representing Michelson. (R., at 5.) Smith called upon one student to participate in the debate, but the student declined to engage. After class, some students approached Barrett to express their discontent with Smith's efforts. (R., at 6.)

In their discussion with Barrett, the students claimed to feel personally attacked by Smith's statements and generally discomfited with the discussion of Sanders, Michelson, and cancel culture. (R., at 6.) They furthered expressed their belief that Smith's classroom was no longer a safe learning environment. (R., at 6.) Some of these students subsequently posted about Smith's in-class comments on WCC's social media page. (R., at 6.) Notably, no students attributed Smith's speech to the university itself in either the meeting or the social media posts. (R., at 6.)

Respondents' Reaction to the Students' Classroom Feedback

Barrett and Hall held a meeting with Smith to discuss the social media posts. (R., at 6.) Smith explained that his teaching approach was designed to help students navigate controversial issues, a crucial part of the curriculum. (R., at 6.) Barrett and Hall informed Smith that they would investigate further and asked him to refrain from discussing "cancel

culture" in the classroom. (R., at 6.) Smith expressed his disagreement with their position and the meeting concluded. (R., at 6.)

The next day, students in Smith's Section B Philosophy of Law class interrupted the lesson when Smith discussed the same content from the previous day. (R., at 7.) Several students walked out of the class in protest as Smith continued to teach, and those students went to the WCC social media page to call for Smith's termination. (R., at 7.) Thereafter, WCC removed Smith from teaching the Philosophy of Law course for the remainder of the semester but allowed him to continue teaching his two introductory Formal Logic courses. (R., at 7.)

The NSE Curriculum and WCC's Conditions for Rehiring Smith

By the spring of 2019, the NSE program was ready, and Hall approached Smith with a formal employment offer. (R., at 7.) Under the new contract, Smith's teaching load would include four courses: two Formal Logic courses and two Introductory Survey courses. (R., at 7.) Additionally, the program required Smith and other NSE professors to attend an NSE orientation session run by Hall. Following the session, professors would be required to adhere to the curriculum and guidelines adopted by the NSE committee and the WCC administration. (R., at 7–8.)

These guidelines introduced several procedural and substantive changes to teaching at WCC. For example, teachers at WCC had traditionally designed their own syllabus; but the NSE program mandated that instructors include certain provisions. (R., at 8.) First, WCC's policies as they pertained to diversity, accessibility, and civility policies, as well as WCC resources and campus information. (R., at 8.) Second, WCC's Land Use Acknowledgment clause, which included oaths of affirmation in opposition to Lockean property theory, Smith's primary research interest.¹ (R., at 8.)

¹ As the Record reflects, Respondents concede on appeal that Smith's views are genuine and contravened by the Land Use Acknowledgement Clause. (R., at 8.) Therefore, if this Court were to

The NSE curriculum also included new classroom teaching requirements. (R., at 8.) Once a week, 20 minutes of class time would be devoted to promoting WCC community values. (R., at 8.) In this time, professors would discuss weekly NSE readings, as designated by the administration, and read aloud bullet points. (R., at 9.) After class, students were to submit written reflection papers to be read aloud by Smith to the students. (R., at 9.) The language Smith would be forced to use included, “*our* campus values ...” and “at WCC *we* value....” (R., at 9) (emphasis added.) According to Barrett, the purpose of the new curriculum was to build shared values, increase student engagement and retention, and help students of diverse backgrounds feel more comfortable in class. (R., at 9.) Barrett notified Smith that NSE administrators would be monitoring the NSE classes in order to assess the effectiveness of the new program. (R., at 9.)

Following the orientation, Smith arranged a meeting with Barrett and Hall to express his two main concerns with the NSE program. (R., at 9.) First, Smith was concerned that students may assume he believed in the Land Use Acknowledgement clause, and expressed a view of property directly opposed to his own. (R., at 9.) Hall informed Smith that the clause would be mandatory for all NSE courses. (R., at 9.) Smith suggested adding a disclaimer to the syllabus stating the clause did not align with his personal view, or alternatively, placing a link to the WCC website for students to access rather than the entire full clause. (R., at 9.) Hall rejected both of Smith’s solutions. (R., at 9.)

Second, although Smith had no objections to including NSE subject matter and assigning the extra readings for the course, he was concerned with the required bullet points in the NSE lesson plans. (R., at 9–10.) Smith raised a conscientious objection to teaching those bullet points in a manner that implied his personal adoption or endorsement of those views. (R., at 10.) Barrett and Hall dismissed Smith’s concerns. (R., at 10.) Still, Smith

find that the government speech doctrine does not apply to the instant case, any balancing inquiry or test would be analyzed by the district court on remand.

proposed a compromise: after incorporating the viewpoints of WCC into the curriculum, he asked for the ability to present his own position and “engage the class in discussion recognizing multiple viewpoints[.]” (R., at 10.) Barrett and Hall rejected the suggestion and cautioned Smith that his NSE course would be monitored by WCC administrators. (R., at 10.) Smith was willing to look for a workable alternative approach but was reluctant to include the Land Acknowledgement clause into the syllabus or convey the bullet points as written due to the conflict they created with his academic views. (R., at 10.)

Shortly thereafter, Hall informed Smith that WCC has rescinded his contract offer for the fall 2019 semester. (R., at 10.) According to Hall, because Smith was unwilling to fulfill the curricular requirements, WCC would instead hire someone who would. (R., at 11.) Smith asked if he could continue to teach his Formal Logic courses or other courses that did not include the NSE curriculum. (R., at 11.) Hall declined his counteroffer. (R., at 11.) Smith subsequently filed a lawsuit against Hall, Barrett, and WCC. (R., at 11.)

SUMMARY OF ARGUMENT

The Thirteenth Circuit Court of Appeals erred in affirming the district court’s denial dismissal of Smith’s First Amendment compelled speech claim. The courts below improvidently relied on the government speech doctrine outlined in *Garcetti v. Ceballos*, requiring Smith to adopt the government’s viewpoint.

Smith’s compelled speech claim must prevail for two reasons. First, the Respondents incorrectly attempt to define the speech in the instant case as government speech. Under *Shurtleff v. City of Bos., Massachusetts*, the Respondents fail to satisfy the requisite factors of the speaker analysis: the history of the expression, the public’s perception of the speaker, and the extent of the government’s control over the expression. Respondents fail to show that the reasonable member of the audience, a student in Smith’s classroom, would perceive his classroom instruction as speaking on behalf of WCC. Moreover, Respondents have not

shown a longstanding history of curricula like the NSE, which counsels against a holding of government speech.

Second, the Thirteenth Circuit failed to acknowledge this Court's precedent, which disallows the government from trying to force a public employee to adopt the viewpoint of the government as their own. As recognized in *Janus v. AFSCME*, members of the founding generation condemned laws similar in effect to the NSE curriculum. Accordingly, the lower court's decision as it pertains to the 12(b)(6) motion to dismiss Smith's 35 U.S.C. § 1983 claim must be reversed, and this case remanded back to the lower courts to apply an analysis consistent with this brief.

ARGUMENT

Respondents' Efforts to Compel Smith's Speech Against His Profoundly Held Academic Beliefs Violate His Fundamental First Amendment Rights and Do Not Adhere to the Government Speech Doctrine.

The freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); see *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (“Since *all* speech inherently involves choices of what to say and what to leave unsaid ... one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say[.]”) (citing *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (internal quotations omitted)).

This powerful statement presupposes an even greater admonition—the government may not coerce citizens to adopt or convey a message. *Barnette*, 319 U.S. at 642 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

A. *Freedom From Compelled Government Speech is a Fundamental First Amendment Protection Extending to Verbal Speech and Nonverbal Assertions*

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), this Court held that the First Amendment prohibited West Virginia from compelling public school children to recite the Pledge of Allegiance and salute the flag. *Id.* at 642. Observing that such a mandate invaded the “individual freedom of mind,” this Court recognized that such conformity is repugnant to the First Amendment. *Id.* Under *Barnette*, no law can compel an individual to deviate from this “fixed star.” *Id.* (“If there are any circumstances which permit an exception, they do not now occur to us.”).

Three decades later, in *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court extended *Barnette* to compelled speech which *indirectly* affirms a message, striking down a New Hampshire law imposing criminal sanctions upon Jehovah’s Witnesses who refused to display the state’s motto, ‘Live Free or Die,’ on their license plate. *Id.* at 707. In *Wooley*, this Court recognized that a flag salute involved a more severe infringement, as the display of a license plate less directly compels an individual to affirm a viewpoint. *Id.* at 715. However, it explicitly noted that this difference was one “essentially of degree.” *Id.* Inasmuch as the New Hampshire law required an individual to adopt a morally objectionable message, this Court required the showing of a sufficiently compelling state interest and no less drastic means for achieving the same basic purpose. *Id.* at 716–7.

These cases demonstrate two important principles: (1) states may not compel individuals to support a curricular message of orthodoxy directly, *Barnette*, 319 U.S. at 642; (2) nor can states compel individuals to engage in conduct which a third party would understand to be support of a message, *Wooley*, 430 U.S. at 707.² In any of these

² Similarly, it cannot force businesses or individuals to pay money to support a program they would not otherwise support. See *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (holding that these protections apply to businesses compelled to pay monetary subsidies); see also *Janus*, 138 S. Ct.

circumstances, strict scrutiny applies. *Id.* at 716; see Clay Calvert, *Selecting Scrutiny in Compelled-Speech Cases Involving Non-Commercial Expression: The Formulaic Landscape of A Strict Scrutiny World After Becerra and Janus, and A First Amendment Interests-and-Values Alternative*, 31 Fordham Intell. Prop. Media & Ent. L.J. 1, 85 (2020) (discussing the importance of strict scrutiny in claims regarding compelled speech of opinions rather than compelled speech of facts).

If this Court were to—as the Respondents have argued it should—adopt a lower level of scrutiny for compelled speech claims in schools, then it would erode a fixed star of constitutional jurisprudence. See Joseph J. Martins, *The One Fixed Star in Higher Education: What Standard of Judicial Scrutiny Should Courts Apply to Compelled Curricular Speech in the Public University Classroom?*, 20 U. Pa. J. Const. L. 85, 135 (2017). Accordingly, this Court should reverse this case and remand it to the district court for application of strict scrutiny.

B. The Speech Implicated In the Instant Case Does Not Fall Within Purview of the Government Speech Doctrine

Government speech is not barred by the First Amendment. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). When the government is the speaker, the democratic electoral process serves as a check on that speech. *Id.* In line with this exception, the government may discriminate “on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.” *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

Opposite to government speech lies the compelled speech doctrine. The government may not “compel private persons to convey the government’s speech.” *Walker*, 576 U.S. at

at 2463 (applying similar analysis to compelled subsidization of union dues). This line of cases and their modified scrutiny analysis set them apart from *Barnette* and *Wooley*. See *Janus*, 138 S. Ct. at 2463.

208. This Court has recognized that even government speech can raise free speech concerns. *Id.* at 219 (“Our determination that Texas’s specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons.”); see *Wooley*, 430 U.S. at 717, n.15 (observing that a vehicle “is readily associated with its operator” and that drivers displaying license plates “use their private property as a ‘mobile billboard’ for the State’s ideological message”).

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), this Court considered the following factors to determine whether the state of Texas spoke for itself: whether the forum in which the speech occurred had historically been used for government speech, whether the public would interpret the speech as being conveyed by the government, and whether the government had maintained control over the speech. *Id.* at 209 (finding that the state board had engaged in government speech because the license plates in question historically conveyed governmental ideologies, the public was likely to believe that messages on license plates were on the government’s behalf, and the state had “maintain[ed] direct control” over proposals and “actively” reviewed them).

In *Shurtleff v. City of Bos., Massachusetts*, this Court reaffirmed that these interpretations are evaluated via a holistic application of factors. 142 S. Ct. at 1589. They are guided by the history of the expression, the public’s perception as to who—the government or a private person—is speaking, and the extent of the government’s control over that expression. *Id.* (finding that the City of Boston’s flag approval process, which historically conveyed the government’s messages, was not governmental speech because observers could view the message as private, and the city had no meaningful involvement in the selection of flags).

As applied to university professors, circuit courts have looked to the nature of the professor’s speech. For example, the Sixth Circuit has held that a university requires a professor to provide “detailed advice to students about the administrative aspects of a

course.” See *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 591 (6th Cir. 2005). However, that professor could not be constitutionally compelled to “communicate the ideas or evaluations of others as if they were her own.” *Id.* at 595.

Under the great weight of circuit precedent, professors have no First Amendment interest in the formalities of teaching: grading, administrative duties, and ministerial conduct. See, e.g., *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) (“Because grading is pedagogic, the assignment of the grade is subsumed under the university’s freedom to determine how a course is to be taught.”).

However, in *Garcetti*, this Court noted the complex nature of claims involving classroom speech dedicated to the curricular subject matter and the need to protect the academic speech and viewpoint of college professors. See *Garcetti*, 547 U.S. at 425. And the majority of circuits have walked through this door. See *Meriwether*, 992 F.3d at 507 (collecting cases). But the Thirteenth Circuit, contrary to this Court’s strong consideration, altogether ignored this dictum. (See R., at 21.)

In the instant case, the Thirteenth Circuit held that Smith’s allegations were insufficient to state a claim, finding that the Respondents never required Smith to adopt their viewpoint as it pertains to the NSE curriculum. (R., at 21.) It reasoned that being required to speak “our values as WCC” and “WCC’s values as a community” fall short of constituting a First Amendment compelled speech claim. (R., at 21.) Further, it held that “being required to describe and convey the position of the government ... is *not* equivalent to requiring the employee to *personally* endorse the ideas.” (R., at 21.) Thus, the Thirteenth Circuit appears to have held—without analyzing—that Smith’s speech would be attributable to him as an officiant of the government, rather than as a private citizen.

The speech in question cannot fall under the government-speech doctrine as the Thirteenth Circuit contends. (R., at 18.) Further, the government cannot compel conformity

nor require a college professor to adopt a specific viewpoint on a matter of public concern. *See, e.g., Meriwether v. Hartop*, 992 F.3d 492, 510 (6th Cir. 2021).

1. *Smith Is Entitled in First Amendment Protections Because His Speech Does Not Meet the Shurtleff Government Speech Test*

In *Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583 (2022), this Court underscored that government speech is a holistic inquiry subject to no formulaic test. *Id.* at 1589. Under *Shurtleff*, courts examine the history of the expression, the public’s perception as to who is speaking, and the extent of the government’s control over the expression. *Id.*

Concerning the government’s control, it is clear that WCC exercised little control over Smith’s expressions made pursuant to curricular speech. Indeed, WCC continued to rehire Smith each year, fully aware of his distinctive and enigmatic teaching style. By contrast, the state board in *Walker* had “maintain[ed] direct control” over license plate designs by “actively” reviewing every proposal and rejecting at least a dozen. *See Walker*, 576 U.S. at 213; *see Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 472–473 (2009) (finding that Pleasant Grove City spoke for itself by erecting a monument because the City had “almost always” chosen the subject matter of monuments). Here, akin to *Shurtleff*, there is no “comparable record” of public colleges exercising control over faculty. *See Shurtleff*, 142 S. Ct. at 1589. University professors unquestionably occupy a public position beyond the “direct control” of the state. *Walker*, 576 U.S. at 213; *see Meriwether*, 992 F.3d at 507. Any speech by Smith is inherently his own—not WCC’s.

As to the reasonable observer prong, Justice Breyer’s analysis in *Shurtleff* focused on the fact that the City of Boston could have done more to clarify that it was speaking for itself. 142 S. Ct. at 1593 (“Boston could easily have done more to make clear it wished to speak for itself by raising flags.”). Justice Breyer pointed out that other cities provided text expressly declaring the intent to express their views. *See id.* (“The City of San Jose, California, for example, provides in writing that its ‘flagpoles are not intended to serve as a

forum for free expression by the public,’ and lists approved flags that may be flown ‘as an expression of the City's official sentiments.’”) (further citation omitted). Like the City of Boston, WCC seeks to have its cake and eat it too. Neither the inclusions in the syllabus nor the classroom discourse clearly demonstrate that the *institution* is speaking, highlighting WCC’s lack of control. *Id.* If the syllabus had a carve-out similar to the one suggested by Justice Breyer, there would be no dispute that the speech was of government character.

Further, the record suggests that a reasonable student would perceive Smith’s speech to be his own, rather than WCC’s. For example, students generally attributed Smith’s speech to Smith himself. The record indisputably shows that students approached Barrett “to complain about *Smith’s* statements in class” because they felt “personally attacked by *his* criticisms.” (R., at 6) (emphasis added.) They felt “uncomfortable with *Smith’s* commentary.” (R., at 6.) (emphasis added.) This indicates that students deem Smith’s speech as attributable to him. Additionally, the record further shows that Smith is the sole lecturer in his classes, selects the majority of the curriculum, and facilitates class discussions. (R., at 4–5.) Reasonable observers would—and clearly did—believe that this was Smith’s personal speech. For this reason, they are likely to attribute future speech to him as well.

It is worth noting that while the government may have some interest in a public employee aligning their personal message with that of the public employer, the attributes of a college professor in a public school are afforded exceptions. B. Jessie Hill, *Compelled Speech: The Cutting Edge of First Amendment Jurisprudence: Look Who's Talking: Conscience, Complicity, and Compelled Speech*, 97 Ind. L.J. 913, 917 (discussing the limits on government's ability to compel the speech of a professor, especially when the government message is ideological in nature). The academic freedom exception maintains that a college or university professor has a stronger interest in preserving their academic viewpoint even when conveying a message on behalf of a public institution. *See Meriwether*, 992 F.3d at 506 (noting that the government cannot silence the viewpoint of a professor, especially viewpoints

that can spark insightful classroom discussion). Here, Smith's interest in his students being aware of his position as it pertains to the NSE message is supported by the academic freedom doctrine. *Id.* at 507 (“[A] professor's in-class speech to his students is anything but speech by an ordinary government employee.”).

Finally, the historical inquiry counsels in favor of Smith. In the government speech context, the historical background factor looks not to “general history.” *Shurtleff*, 142 S. Ct. at 1591. Rather, it looks at how the government tends to express its view via a certain medium of expression. This factor cuts both ways. Undoubtedly, there is a “general history” of the government expressing its views in grammar schools across America. But there is no such tradition amongst institutions of higher education, which have been, at times, the seat of government protests.

2. The Government Can Neither Compel Conformity of Public University Professors Nor Require Them to Adopt the Government's Viewpoint as Their Own

The foundation of compelled speech draws from the “general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” *Hurley*, 515 U.S. at 573. Under the thrust of the First Amendment, “members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed.” *Janus*, 138 S. Ct. at 2471. Free speech rights may be implicated, like here, where the government compels individuals to speak, even if the government is engaged in speech. *See Wooley*, 430 U.S. at 714. Even when it acts as speaker, the government cannot compel public officials to affirm nor adopt a viewpoint; it can only require them to state the government's position. *See Janus*, 138 S. Ct. at 2470.

The WCC Land Use Acknowledgement Clause, which Smith must include in his syllabus, plainly requires a value judgment presupposed by the *Hurley* court. *See Hurley*, 515 U.S. at 573. Similarly, the NSE program requires Smith to read out loud a document

saying, “*our* campus values include” and “at WCC, *we* value....” These statements force faculty members to *personally* endorse the values of WCC, thus triggering the First Amendment. See *Hurley*, 515 U.S. at 573. Thus, these policies involve directly compelling speech, *Barnette*, 319 U.S. at 642, or at least acting indirectly such that a reasonable observer could attribute the ideas to the speaker. See *Wooley*, 430 U.S. at 707.

Here, the Respondents attempt to force Smith not only to state WCC’s position, but to also adopt it as his own. This runs afoul of the spirit of the First Amendment: colleges may assign curriculums but cannot force their teachers to adopt the viewpoints of the government. See, e.g., *Kennedy v. Bremerton School District*, 597 U.S. ____ (2022) (“[T]he First Amendment’s protections extend to ‘teachers and students’ neither of whom ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse.’”) (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)). For example, a teacher may be required to teach their students the history of an American flag within a history class; however, that same teacher cannot be forced to pledge their allegiance to that flag or state that they believe in its values. See *Barnette*, 319 U.S. at 624. By not allowing Smith to clarify his personal position as to the NSE curriculum, the Respondents trampled on an essential constitutional right.

CONCLUSION

Because the First Amendment limits a public college or university from compelling a professor’s speech when it conflicts with their deeply held academic beliefs, this Court should REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit and remand this case for further proceedings.

Respectfully submitted,
Attorney for the Petitioner

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Journal(s)	University of Pennsylvania Law Review
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June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to be considered for a one-year clerkship position for the 2024-2025 term. I am a rising 3L student at the University of Pennsylvania Carey Law School.

I am interested in clerking in the district court to understand further how facts are interpreted by the Court and used to come to the correct legal conclusion. I like to think of myself as a pragmatic problem-solver who excels in a fast-paced environment, and the Eastern District of Virginia would be an excellent place for me. Further, I am interested in becoming an Assistant United States Attorney particularly focused on white-collar crime and your Honor's experience as an Assistant United States Attorney would provide invaluable experience to my young career.

My time on the Penn Law Review has refined my attention to detail and taught me to think critically while editing complicated topics. My pursuit of a Master of Bioethics, as well as my experiences growing up in a multiethnic household, have helped to frame how I think about the law by providing me with different perspectives to work through complex problems and approach issues with humility and an understanding that the parties involved might have different values and priorities than me.

Enclosed are my resume, transcript, and writing sample. My letters of recommendation from Professor Paul Kaufman (paul.kaufman2@usdoj.gov, 856-757-5230), Professor Kimberly Ferzan (kferzan@law.upenn.edu, 215-573-6492), and Holly Burch, Esq. (Holly.Burch@dea.gov, 571-776-3232) are also included. Please let me know if there is any additional information I can provide.

Sincerely,

Nataniel Y. Tsai
Encls.

Nataniel Y. Tsai

(602) 582-0988 | 2308 Lombard Street, Philadelphia, Pennsylvania 19146 | nytsai@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA

Juris Doctor, Expected May 2024

- Development Editor of *University of Pennsylvania Law Review* 2023-2024
- Associate Editor of *University of Pennsylvania Law Review* 2022-2023
- Comment: Medicare Part D Negotiations: Meaningful Change or A Step in the Right Direction?
- Equity and Inclusion Fellow for the Penn Law Office of Diversity and Inclusion
- LALSA (Latinx Affinity Group) – Vice-President 2022-2023, 1L Representative

University of Pennsylvania Perelman School of Medicine, Philadelphia, PA

Master of Bioethics, Expected May 2024

University of Arizona, Tucson, AZ

Bachelor of Science in Public Health with Honors, summa cum laude, Outstanding Senior, August 2017 – May 2021

Bachelor of Arts in Political Science, summa cum laude

- Senior Thesis: Legal Challenges to State Regulation of Pharmacy Benefit Managers

WORK EXPERIENCE

Arnold & Porter, Washington DC

Summer Associate, Summer 2023

- Performed research and wrote a memo in support of a pro bono FOIA litigation matter
- Conducted research into the legislative history regarding an ambiguous term pertaining to Medicaid

Department of Justice, Arlington, VA

Intern for Chief Counsel for the Drug Enforcement Administration, May 2022-August 2022

- Prepared charging and prosecution documents related to the revocation of a healthcare provider's license to prescribe controlled substances
- Directed and cross-examined special agents in training during moot court exercise at Quantico
- Drafted a brief in support of the administration relating to an employment discrimination case

Philadelphia Legal Aid, Philadelphia, PA

Intern with Medical Legal Community Partnership Unit, January 2022-May 2023

- Researched legal questions regarding public benefits
- Advised clients as to how their immigration status would affect their access to healthcare

University of Arizona Campus Health, Tucson, AZ

Health Promotion Intern/Student Worker, August 2020-May 2021

- Educated students about various health topics, transcribed patient data and observed patients' reactions to the COVID-19 vaccine

Arizona Third Congressional District, Tucson, AZ

Office Intern, January 2020-March 2020

- Answered constituent's questions regarding issues with federal agencies, particularly regarding immigration

University of Arizona Honors Alternative Spring Break, Nogales, AZ and Sonora, Mexico

Trip Leader, May 2019-May 2020

- Co-designed and co-led a week-long trip centered on immigration and border issues
- Collaborated with non-profit groups to create volunteer opportunities; fundraised; responsible for ten participants for trip duration

LANGUAGE & INTERESTS

Language: Spanish (professional working proficiency)

Interests: Cooking (primarily Chinese, Mexican, and Thai food.), sports (Liverpool F.C., Arizona Cardinals, Dallas Cowboys, University of Arizona teams), and traveling (in particular around the United States, Latin America, and Asia)

Nataniel Tsai
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure: Trial and Adjudication	The Hon. Stephanos Bibas	A-	3	
Health Insurance Reform and Regulation	Allison Hoffman	A-	3	
Federal Indian Law	Catherine Struve	A-	3	
Law Review	Elizabeth Pollman	Ungraded	1	

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Antitrust	Herbert Hovenkamp	A	3	
Evidence	Kimberly Ferzan	A-	4	
Healthcare Fraud: Investigation and Prosecution	Paul Kaufman	A-	3	
Women, Law, and Leadership	Rangita de Silva de Alwis	A	3	

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Sophia Lee	A-	3	
Criminal Law	Sean Ossei-Owusu	B	4	
Constitutional Law	Kermit Roosevelt	B+	4	
Plagues Pandemics and Public Health Law	Eric Feldman	B+	3	
Legal Practice Skills	Jessica Simon	Passed	3	

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Yanbai Andrea Wang	A-	4	
Contracts	David Hoffman	B	4	
Torts	Karen Tani	B+	4	
Legal Practice Skills Cohort	Eric Makarov	Passed	1	
Legal Practice Skills	Jessica Simon	Passed	3	



U. S. Department of Justice
Drug Enforcement Administration
Office of Chief Counsel

www.dea.gov

March 21, 2023

Dear Judge:

It is with great pleasure that I recommend Nataniel Tsai for an attorney position with your court. Nataniel joined the Drug Enforcement Administration (DEA) for his 1L summer internship during which I was his direct supervisor. DEA could not have made a better choice than to have Nataniel as one of three interns for its 2022 internship class.

Naturally soft-spoken, Nataniel balanced the class with grace, humility, and an unexpected humor. His goals while with the DEA were to improve his legal research & writing and confidence; without question, he grew by leaps and bounds in these areas during his time at the DEA. From working on an Order to Show Cause to remove a doctor's license, to drafting agency-wide guidance on the Hatch Act, to drafting the Agency's Brief in an EEO appeal, he was always willing – and seeking – to try new work, and was happy to do any work that needed to be done. As part of a small, three-person intern team, he was integral to the success of the team, balancing his individual projects with the team's projects, whether team lead or member. He flew through assignments, working on both quick turn-around and long-term projects, always making sure to seek out guidance and feedback, as appropriate. Not only did he reach out to the attorneys he worked with for constructive criticism on his projects, but he also sought assistance on citations and memo drafting from our litigation experts. Nataniel showed a strong work ethic and dedication to his internship, often taking on numerous projects at the same time, completing them in an appropriate timeframe, and asking pertinent questions when necessary.

Nataniel demonstrated excellent professionalism, drive, and accountability during his time at the DEA. I have stayed in touch with Nataniel since his summer with DEA and continue to believe that not only is going to be a wonderful lawyer one day soon, he is already an amazing person. Any legal office would be exceedingly lucky to have Nataniel join them. I hope that office is yours.

It is with great confidence and excitement that I recommend Nataniel to your office. Nataniel's intelligence, legal skills, professionalism, and pure drive to succeed will not disappoint should you give him the opportunity. Thank you for the opportunity to recommend Nataniel. Please feel free to contact me at holly.burch@dea.gov or 202-251-3712 should you wish to discuss anything further.

Sincerely,
/s/

Holly M. Burch
Senior Attorney, Foreign Section / Intern & Honors Program Director
Office of Chief Counsel
Drug Enforcement Administration

**U.S. Department of Justice
United States Attorney
Eastern District of Pennsylvania**

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Nataniel Tsai

Dear Judge Walker:

I write in recommendation of Nataniel Tsai for a clerkship with your court. I got to know Nathaniel through my class, Health Care Fraud: Investigation and Prosecution, at the University of Pennsylvania Carey Law School.

My class is a bit unusual, but I believe it gives me a valuable perspective on how Nathaniel thinks and reasons. The class covers a variety of detailed topics, including the civil False Claims Act, Stark Law, and Anti-Kickback Statute, federal crimes ranging from Wire Fraud and False Statements to Misbranding, and investigative techniques from consensual interviews to Title III wiretaps. It is an intense, practically-oriented instruction, and it requires a precise delineation of complex and ambiguous legal subjects (materiality in the False Claims Act arena after the Escobar, scienter for violations of the Anti-Kickback Statute, and so forth) applied to factual contexts from solo physician offices to pharmaceutical corporations. The examination is a highly-compressed, three-hour sprint that forces students into the role of AUSAs and defense counsel analyzing ambiguous, challenging fact patterns on both the practical and legal levels.

That Nathaniel scored as he did on that exam is a testament to him and to his ability to reason through complex legal scenarios. The statutes I teach are among the trickiest in law, and their intersection makes the questions I ask exponentially more so. I was impressed with Nathaniel's performance and the mind and work that led to it. In addition, Nathaniel was required to present on a topic of his choice, and so I was able to observe him with his peers and even able to borrow a small component of his presentation on opiate fraud for my exam.

Since my class ended, I have also gotten to know Nathaniel better as a person. He is a delightful, laid-back law student whose chill demeanor belies an intense desire to improve himself as an attorney, one who is willing to take on serious intellectual challenges if it means reaching a better level of understanding. Despite his intellect, Nathaniel is humble, plain-spoken, honest, and grounded. He would make a fine addition to any Chambers, and you could rest assured knowing that he would be a part of the team, bereft of the arrogance, pig-headedness, or plain cussedness that can taint the Chambers dynamic or affect the courthouse family. People like Nathaniel, and with good reason.

If you have any additional questions or would like to discuss this matter further, please do not hesitate to contact me or to have someone from your Chambers do so. I am always happy to see good people find one another, and I know that Nathaniel will make a real contribution wherever he lands, bringing a great deal to the table without taking anything off of it.

Respectfully,

PAUL W. KAUFMAN
Assistant United States Attorney
Adjunct Professor
University of Pennsylvania Law School
Email: paul.kaufman2@usdoj.gov
Tel: 215-861-8618

Paul Kaufman - Paul.Kaufman2@usdoj.gov - 2153708774

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Nataniel Tsai

Dear Judge Walker:

I am delighted to recommend Nataniel Tsai for a clerkship. Nataniel was a student in my Evidence class, wherein he received an A-. Nataniel is a bright and tenacious student who will be an exemplary law clerk.

Academically, Nataniel is a terrific student. I teach my Evidence course with two case files, where students represent two clients for the entire semester, and they complete problems based on those case files. Not only was Nataniel consistently engaged and prepared in class but he would also drop in on office hours when he had a question. He was not a constant attendee, but rather, would triage his questions so as to focus on particularly complex issues. In general, it was clear that Nataniel tried to figure things out and would come to office hours when he had really put in the work to master the material.

His exam was very strong. My Evidence class was very gifted, with a significant number of Law Review students. In a crowded field, Nataniel still performed above the mean, demonstrating significant mastery of the material as well as the ability to write clearly under significant time pressure.

Interpersonally, Nataniel is quiet, unassuming, and thoughtful. But he is also tenacious. Not only does he love to be challenged in classes but he enjoys throwing himself into material so that he can learn and master topics. He enjoyed law review specifically because it pushed him to become a stronger writer. Ultimately, I would expect him to work well independently, to be willing to take on the most challenging of research questions, and to respond well to feedback and criticism. He will be an ideal law clerk.

I recommend Nataniel wholeheartedly. Please do not hesitate to contact me if you have any questions about his candidacy.

Sincerely,

Kimberly Kessler Ferzan
Earle Hepburn Professor of Law
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215-573-6492

Kimberly Ferzan - kferzan@law.upenn.edu - 215-573-6492

Writing Sample

I drafted the attached writing sample as an assignment for my 1L summer internship at the Drug Enforcement Administration's Office of Chief Counsel. The assignment required drafting a brief in response to a complaint of discrimination and a hostile work environment filed by a current employee of the administration. I conducted all the research necessary for the assignment. I received broad feedback from my supervising attorney for the brief and then submitted my draft to my supervising attorney. I have received permission to use my draft of the brief as a writing sample for clerkship applications in its current redacted form.

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS**

[REDACTED],
)
)
 Complainant,)
)
 v.) [REDACTED]
)
)
 MERRICK GARLAND,)
 ATTORNEY GENERAL,)
 U.S. DEPARTMENT OF JUSTICE)
)
) [REDACTED]
 Agency.)
)

AGENCY’S OPPOSITION TO COMPLAINANT’S APPEAL OF FINAL AGENCY DECISION

The United States Department of Justice, Drug Enforcement Administration (“DEA” or “the Agency”), submits this opposition to Complainant [REDACTED] Appeal of the Final Agency Decision (“FAD”). As stated herein, the FAD should be affirmed.

PROCEDURAL BACKGROUND

██████████ (“Complainant”) alleges that she was discriminated against on the basis of her sex (female) and race (African American). FAD at 1. Specifically, the allegations accepted for investigation were whether such discrimination occurred when:

1. [O]n October 27, 2020, she received an overall rating of “Successful” on her annual performance evaluation;
2. [O]n undetermined dates, the Group Supervisor required her to submit written operational plans and to notify other agents before conducting an operation, thereby holding her to a different performance standard than her white coworkers; and
3. [W]hen the Group Supervisor subjected her to a hostile work environment by following her around the work place and asking her coworkers about her personal life.

Id. Complainant did not request a hearing before an Administrative Judge. Accordingly, the case was presented to the Complaint Adjudication Office (“CAO”) for a FAD. In its decision issued on April 7, 2022, the CAO found that “the record fails to demonstrate that complainant was subjected to disparate treatment or a hostile work environment based on her race or sex.” *Id.* at 11.

Complainant noticed this appeal on May 5, 2022, and submitted her brief on June 6, 2022.

FACTUAL BACKGROUND

Complainant is a Special Agent (“SA”) in the DEA’s [REDACTED] Field Division Office. Report of Investigation (“ROI”) at 61-62. Her first line supervisor was Group Supervisor (“GS”) [REDACTED]. *Id.* at 62. GS [REDACTED] was Complainant’s first-line supervisor from August 2019 until May 2020. *Id.* at 104. On or about October 27, 2020, Complainant received a performance evaluation rating of “Successful” for October 1, 2019, to May 23, 2020, with GS [REDACTED] as the rating official. *Id.* at 4, 105, 228. Acting GS [REDACTED] was Complainant’s rating official from May 24, 2020, until June 20, 2020, following her transfer; however, since he did not supervise her for at least the required 90 days, he did not provide her with a rating. *Id.* at 227. From the period of June 21, 2020, until September 30, 2020, Complainant was rated by GS [REDACTED] who gave Complainant a rating of “Excellent.” *Id.* at 145, 220. Complainant’s overall rating for October 1, 2019, through September 30, 2020, was determined by using a formula that combined her interim rating from GS [REDACTED] with the rating GS [REDACTED] provided, which equated to an overall “Successful” rating. *Id.* at 145, 226. Complainant did not agree with the rating, as she believed that she deserved a higher rating. *Id.* at 65. Complainant then

discussed her rating with Assistant Special Agent in Charge (“ASAC”) [REDACTED] who concurred with both GS [REDACTED] rating and the overall final rating. *Id.* at 129-130.

Complainant also claims that GS [REDACTED] required that Complainant send her operational plans to the rest of the team while not requiring the same for Complainant’s white coworkers. *Id.* at 69-70. However, Complainant also admitted that written operational plans are required when an SA is conducting an operation. *Id.* at 69.

Complainant also alleges that GS [REDACTED] fostered a hostile work environment by following her throughout the building and that she would see GS [REDACTED] on the second floor when he had no reason to be there. *Id.* at 72-73. GS [REDACTED] denied the allegations, stating that he has meetings throughout the different floors of the building, and Complainant would not know his schedule and where he needed to be. *Id.* at 113. Complainant asserts that GS [REDACTED] inquired about her personal life when he asked her about her relationship to her fiancé at the time and that, at times, GS [REDACTED] would refer to Complainant and other female members of the group as “girls.” *Id.* at 72, 73, 77. GS [REDACTED] stated that, at times, he did ask about Complainant’s personal life, as he was concerned about her because she was not acting herself at work, and when he tried to refer her to the Employee Assistance Program, advised her that she could talk to the Division Pastor, and that any group member and himself were available if she needed anything, Complainant declined any assistance. *Id.* at 114. GS [REDACTED] does not recall referring to Complainant or other female members of the group as “girl.” *Id.* at 115. On May 24, 2020, Complainant and GS [REDACTED] were reassigned to different units as part of a larger reorganization effort by Special Agent in Charge (“SAC”) [REDACTED] due to the needs of the division, which included 28 staff transfers. *Id.* at 163.

ARGUMENT

As this is an appeal from a decision issued without a hearing pursuant to 29 C.F.R. § 1614.110(b), the Agency’s decision is subject to *de novo* review. 29 C.F.R. § 1614.405(a); *see* Equal Employment Opportunity Management Directive 110, Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the *de novo* standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that it “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and... issue its decision based on [its] own assessment of the record and its interpretation of the law.”).

The Agency maintains that application of the *de novo* standard of review will yield the same conclusion – Complainant was not subject to discrimination or a hostile work environment. Though Complainant continues to make a number of different claims, they almost all contain no citations to the record. *See generally* Complainant’s Brief in Support of Appeal (hereinafter, “Complainant’s Brief”). Complainant also requests that, as one of her proposed remedies, the Agency grant Complainant’s transfer to [REDACTED]. *Id.* at 14. However, since the request to transfer was not an issue in the initial complaint or anywhere discussed in the ROI, it is not a remedy that can be granted through this adjudication. ROI at 9, 15, 76, 77.

The CAO’s legal analysis is sound, and the FAD should be affirmed in its entirety.

I. October 2020 Performance Appraisal

As set forth in the FAD, Complainant does not establish a *prima facie* case of discrimination and/or hostile work environment. In order to establish a *prima facie* case of disparate treatment, the Complainant must demonstrate that she suffered a materially adverse employment action because of her race or her sex under circumstances that raise an inference of

discrimination. *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002); *see also Texas Dep't of Comm. Aff. v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Complainant fails to demonstrate that GS [REDACTED] treated other similarly-situated employees who are not a part of Complainant's protected classes differently. Specifically, in this case, SA [REDACTED], a white male, also received a "Successful" rating for the same time period as Complainant from GS [REDACTED]. ROI at 65, 132. Because of this, Complainant cannot show an inference of discrimination, since Complainant was not treated differently than those outside of her protected class. *See generally Young v. Henderson*, EEOC Doc. 03A00083, *1 (May 5, 2000) (stating that a *prima facie* case of disparate treatment discrimination requires the complainant to show that she was treated differently than similarly situated persons who are not members of her protected class). Even though Complainant states that she deserved a higher rating than SA [REDACTED], there is no evidence in the record to support Complainant's subjective and conclusory statement. *Id.* at 66-68. The fact that Complainant's coworkers perceive her to be a lead performer is irrelevant because Complainant's coworkers are not Complainant's supervisor and, as such, are not in charge of rating her performance; that responsibility is given to Complainant's first- and second-line supervisors. *Id.* at 220-33; Complainant's Brief at 6. Further, even if Complainant could show that her performance was superior to SA [REDACTED], she would still need to establish that the rating was related to her protected classes, which she has not done.

Even assuming that the record establishes a *prima facie* case of discrimination, Complainant's claim ultimately fails because DEA management articulated legitimate, non-discriminatory reasons for issuing Complainant a "Successful" rating on her FY 2020 performance appraisal. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (noting

that the “ultimate burden” of persuasion remains “at all times” with the complainant). GS [REDACTED] stated that he did not take into consideration Complainant’s sex and/or race when he formulated Complainant’s rating. ROI at 109. GS [REDACTED] stated that he rated her performance “fairly and accurately” based on the performance standards in her performance work plan. *Id.* at 107-08. Also, GS [REDACTED] only issued Complainant her interim rating, not her overall rating, as her overall rating was determined through a formula combining GS [REDACTED] and GS [REDACTED] rating of Complainant. *Id.* at 107, 226.

ASAC [REDACTED], Complainant’s second-line supervisor at the relevant time, explained that Complainant’s sex and race had no bearing on the rating. *Id.* at 131. ASAC [REDACTED] noted that several of the accomplishments Complainant used to support her argument that she deserved a higher rating involved participation in other agents’ operations, rather than operations she generated herself. *Id.* at 129, 130. ASAC [REDACTED] noted that many of Complainant’s cases were spot checks, which do not justify GS-13 investigative work, and many of those cases demonstrated poor effort on the part of Complainant. *Id.* at 129. Nothing in the record supports a finding that these proffered reasons are pretext for discrimination. Even in Complainant’s own brief she states “it is difficult to demonstrate with particularity why the Complainant’s performance rating was inaccurate.” Complainant’s Brief at 7.

II. Application of Different Standards for Operations

The CAO was also correct in concluding that there is no evidence in the record to suggest that GS [REDACTED] had a different standard for Complainant than he did for other similarly-situated agents in his unit.¹ FAD at 9. GS [REDACTED] asserted that he did not require Complainant to notify

¹ The Agency notes that this allegation is untimely. GS [REDACTED] stopped being Complainant’s supervisor in May 2020, and Complainant first contacted the EEO office on approximately November 19, 2020. ROI at 4, 104. This is well outside of the 45-day requirement to bring a discrimination claim. 29 C.F.R. § 1614.105(a)(1).

the team by email of every operation that she conducted. ROI at 111. Complainant cannot point to a single specific instance when GS [REDACTED] required her to notify the unit of an operation that she was undertaking, and there is no evidence in the record to suggest that GS Heigle ever did. *Id.* at 110, 111.

GS [REDACTED] stated that he did not have a higher standard for Complainant and provided an email that asked for operational plans from both Complainant and SA [REDACTED]. *Id.* at 120. No other DEA agent in the unit observed Complainant being held to a higher standard by GS [REDACTED]. *Id.* at 51-53. Complainant's only "evidence" of the unequal treatment she allegedly received is her own observations that there were instances when white agents would return from an operation and not inform anyone. *Id.* at 107. Complainant's alleged observations do not account for the fact that some operations are very time sensitive, and verbal operational plans may be used instead of written operational plans. *Id.* at 160. Complainant's own brief states that it would be difficult to draw a conclusion that she was held to a higher standard from the evidence contained within the record. Complainant's Brief at 4.

Even if it is assumed to be true that GS [REDACTED] did hold Complainant to a different standard regarding the submission of operational plans, the action is not an adverse employment action, thus negating one of the elements for a *prima facie* claim of race or sex discrimination. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998) (holding that for an adverse employment action there must be a tangible employment action that constitutes a significant change in employment status, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). Submitting an operational plan, something that Complainant admits is required for all enforcement operations, ROI at 69, does not rise anywhere near the level of a significant change

in employment status, and thus is not an adverse employment action.

III. Hostile Work Environment Claim

The CAO also correctly concluded that Complainant was not subject to a hostile work environment based on her race or sex.² *See Harris v. Forklift Sys.*, 510 U.S. 17, 21-23 (1993) (noting that to establish a case of discrimination on the basis of a hostile work environment, a complainant must first show that the agency acted with discriminatory animus against a protected group to which the complainant belongs). In order for Complainant to succeed on a hostile work environment claim, the alleged discrimination based on her race or sex must be severe or pervasive enough that a reasonable person would find the workplace to be hostile or abusive. *See generally Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *see also* FAD at 7-8.

In response to Complainant's claim that GS [REDACTED] followed her throughout the building, GS [REDACTED] explained that he often went to the second floor to speak to other personnel on the floor. ROI at 113. There is no evidence in the record, other than Complainant's own suspicions, which suggest that GS [REDACTED] singled out Complainant with his movements throughout the office. The CAO in the FAD stated that there is nothing in the record to support that GS [REDACTED] movements were anything more than normal office conduct. FAD at 10. GS [REDACTED] attending meetings and traveling within the building to perform work related tasks certainly are not actions that a reasonable person would find hostile or abusive.

Complainant also stated that she felt as if GS [REDACTED] fostered a hostile work environment by asking questions relating to her personal life, yet there is no evidence in the record to suggest

² The Agency notes that Complainant's hostile work environment claim is likely untimely. Complainant first contacted the EEO office on approximately November 19, 2020. ROI at 4. However, she dates her allegation about GS [REDACTED] asking about her personal life to December 2019, and the remainder of her hostile work environment claims appear to be from when GS [REDACTED] was her supervisor. ROI at 72-77. Since GS [REDACTED] stopped being her supervisor in May 2020, the last incident constituting her allegation of harassment is well outside of the 45-day time limit to bring a hostile work environment claim. 29 C.F.R. § 1614.105(a).

that GS [REDACTED] asked these questions with the intention of harassing or interfering with Complainant's work or that they were related to Complainant's race or sex. ROI at 113, 114. These questions, which occurred a total of three times within a two-month span, are not enough to succeed on a claim of hostile work environment. FAD at 9-10; *see also* ROI at 73, 113, 114. In order for Complainant to prove a hostile work environment claim, "[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious) do not amount to discriminatory changes in the terms or conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Three instances within two-months are nothing more than isolated incidents, and fail to rise to the level of extremely serious. GS [REDACTED] stated that he was concerned for Complainant, as she had been acting out of character while at the office. *Id.* at 113-14. A reasonable person would not think that her supervisor asking how her relationship is going because she seemed sad, or about her personal life in general, since she did not seem herself, would be abusive or pervasive enough to file a hostile work environment claim. ROI at 113-14, 189.

Complainant also alleges that GS [REDACTED] called Complainant and other females "girl" and often micromanaged their work. ROI at 57-58. Yet again, simple teasing, offhand comments, and isolated incidents are not sufficient for Complainant to succeed on a hostile work environment claim as EEO regulations are not a "general civility code." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998); *Faragher*, 524 U.S. at 788. Further, GS [REDACTED] stated that he does not recall referring to Complainant or other female members of his team as "girl." ROI at 115. No other witnesses in the ROI stated that they heard GS [REDACTED] refer to Complainant or other female members of the team as "girls." *See generally* ROI. Complainant in her brief states that the use of "girl" is a "Jim-Crow era microaggression." Complainant's Brief at 10. However, even if GS [REDACTED] had used the term toward Complainant, he stated that

there would not have been any racial animus. ROI at 115. This is evident by the fact that it is a common term that is used in his home state of [REDACTED] to refer to a young lady or female.

Id. He was raised to use the term to mean younger lady, his mother still uses that term, and he uses it with his family as well to refer to his two adult daughters. *Id.* As such, even if the events occurred in the manner that Complainant has described them, there is no evidence that any of the actions performed or statements made by GS [REDACTED] were motivated by Complainant's race and/or sex and accordingly, Complainant cannot prove a *prima facie* case of hostile work environment. As such Complainant's allegations of hostile work environment must fail.

CONCLUSION

For the foregoing reasons, the Agency respectfully requests that the FAD issued on April 7, 2022, be affirmed in its entirety.

Applicant Details

First Name	Caroline
Last Name	Uehling
Citizenship Status	U. S. Citizen
Email Address	carolineuehling@law.gwu.edu
Address	<div><div>Address</div><div>Street</div><div>16 Snows Ct NW</div><div>City</div><div>Washington</div><div>State/Territory</div><div>District of Columbia</div><div>Zip</div><div>20037</div><div>Country</div><div>United States</div></div>
Contact Phone Number	2678863167

Applicant Education

BA/BS From	George Washington University
Date of BA/BS	May 2021
JD/LLB From	The George Washington University Law School
	https://www.law.gwu.edu/
Date of JD/LLB	May 19, 2024
Class Rank	25%
Law Review/Journal	Yes
Journal(s)	The George Washington University Law Review
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
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Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Colin, Ross
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Young, Kathryne
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Caroline Uehling

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker,

I am a law student at The George Washington University Law School and will graduate in May 2024. I write to apply for a judicial clerkship for the 2024 Term.

Enclosed, please find a resume, a transcript, and a writing sample. In reviewing my transcript, please note that my grade for Criminal Law is “Credit” instead of a letter grade because I took a make-up exam due to an illness during the exam period, per GW Law’s grading policies. Also included are letters of recommendation from Professor Kathryne Young, Professor Erika Pont, and Mr. Colin Ross.

If you have any questions, please feel free to contact me at the above address and phone number. Thank you for your consideration.

Respectfully,

Caroline Uehling

Caroline Uehling

16 Snows Ct NW • Washington, DC 20037 • (267) 886-3167 • carolineuehling@law.gwu.edu

EDUCATION

The George Washington University Law School Washington, DC
J.D. expected May 2024

GPA: 3.64 (Thurgood Marshall Scholar - Top 16-35% of class as of Spring 2023)

Activities: *The George Washington Law Review*, Articles Editor; Writing Fellow; Research Assistant to Professor Miriam Galston; International Refugee Assistance Project, Communications Director; Civil Procedure Tutor

The George Washington University Washington, DC
B.A., *summa cum laude*, Political Science and History May 2021

Activities: No Lost Generation, Symphonic Band, President of Democracy Matters

WORK EXPERIENCE

Military Commissions Defense Organization Arlington, VA
Legal Intern May 2023 – Present

- Assists legal defense team through discovery review, legal research, drafting motions and memoranda, and preparing for hearings.

Pro Se Staff Attorney's Office, United States District Court for the District of Maryland Baltimore, MD
Legal Intern June – July 2022

- Reviewed prisoner civil rights cases; drafted orders and memoranda opinions.

Gilbert Employment Law Silver Spring, MD
Legal Assistant July – August 2021

- Conducted intake interviews with prospective clients and took notes during initial consultations.

Legal Intern June – July 2018; June – August, September – December 2019

- Took notes during initial consultations, meetings with clients, and depositions.
- Drafted litigation plans and deposition digests.
- Organized client documents, prepared binders with exhibits for trial, prepared documents for service.

National Democratic Redistricting Committee Washington, DC
Branding, Creative, and Social Media Intern September – December 2020

- Researched election information for state-by-state infographics, created graphics for endorsed candidates.
- Edited websites for optimal functionality and aesthetics through Squarespace and WordPress.
- Responded to and organized emails to the official account from potential donors and collaborators.

The Office of Congresswoman Madeleine Dean Washington, DC
Intern September – December 2019

- Wrote policy memoranda regarding topics such as per- and polyfluoroalkyl substances (PFAS) contamination and the Endangered Species Act, attended legislative briefings, prepared for hearings.
- Listened to and orally addressed constituents' concerns and complaints; organized written constituent communications and drafted responses; drafted social media posts.

INTERESTS

Volunteer researcher with the Florida Rights Restoration Coalition. Dog walker through Rover.com. Enjoys Phillies baseball, GW Law Softball, playing trombone, hiking, baking, and gardening.

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

Gwid : G40155276

Date of Birth: 21-NOV

Date Issued: 05-JUN-2023

Record of: Caroline Uehling

Page: 1

Student Level: Law
Admit Term: Fall 2021Issued To: CAROLINE UEHLING
CAROLINEUEHLING@GWU.EDU

REFNUM:5606526

Current College(s):Law School
Current Major(s): LawDegree Awarded: Bachelor of Arts 16-MAY-2021
summa cum laude
Departmental HonorsMajor: History
Major: Political Science

SUBJ NO COURSE TITLE CRDT GRD PTS

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2021

Law School
Law

LAW 6202 Contracts 4.00 B+

LAW 6206 Torts 4.00 B+

LAW 6212 Civil Procedure 4.00 A

LAW 6216 Fundamentals Of 3.00 A-

Lawyer I

Pont

Ehrs 15.00 GPA-Hrs 15.00 GPA 3.578

CUM 15.00 GPA-Hrs 15.00 GPA 3.578

THURGOOD MARSHALL SCHOLAR

TOP 16% - 35% OF THE CLASS TO DATE

Spring 2022

Law School
Law

LAW 6208 Property 4.00 A-

LAW 6209 Legislation And 3.00 A

Regulation

Schaffner

LAW 6210 Criminal Law 3.00 CR

LAW 6214 Constitutional Law I 3.00 A-

Morrison

LAW 6217 Fundamentals Of 3.00 B+

Lawyer II

Pont

Ehrs 16.00 GPA-Hrs 13.00 GPA 3.667

CUM 31.00 GPA-Hrs 28.00 GPA 3.619

Good Standing

THURGOOD MARSHALL SCHOLAR

TOP 16% - 35% OF THE CLASS TO DATE

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO COURSE TITLE CRDT GRD PTS

Fall 2022

Law School
Law

LAW 6230 Evidence 3.00 A-

Young

LAW 6400 Administrative Law 3.00 B+

Glicksman

LAW 6520 International Law 3.00 A

Coffee

LAW 6666 Research And Writing 2.00 CR

Fellow

LAW 6886 Domestic Terrorism 2.00 A-

Blinkova

Brzozowski

Ehrs 13.00 GPA-Hrs 11.00 GPA 3.667

CUM 44.00 GPA-Hrs 39.00 GPA 3.632

Good Standing

THURGOOD MARSHALL SCHOLAR

TOP 16% - 35% OF THE CLASS TO DATE

Spring 2023

LAW 6218 Professional 2.00 A+

Responslbty/Ethic

LAW 6360 Criminal Procedure 4.00 B+

LAW 6546 International Law-Human 3.00 A-

Rights

LAW 6552 Law Of War 2.00 A-

LAW 6666 Research And Writing 2.00 CR

Fellow

Ehrs 13.00 GPA-Hrs 11.00 GPA 3.667

CUM 57.00 GPA-Hrs 50.00 GPA 3.640

Good Standing

THURGOOD MARSHALL SCHOLAR

TOP 16% - 35% OF THE CLASS TO DATE

Fall 2022

Law School
Law

LAW 6657 Law Review Note 1.00 -----

Credits In Progress: 1.00

Spring 2023

LAW 6657 Law Review Note 1.00 -----

Credits In Progress: 1.00

***** CONTINUED ON PAGE 2 *****



Katie Cloud
Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

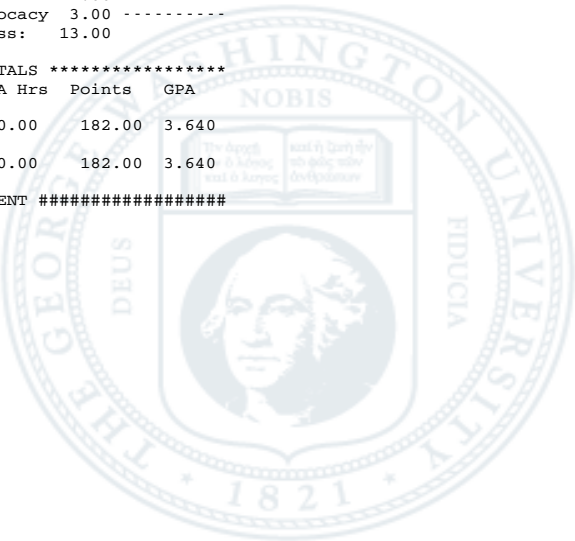
OFFICE OF THE REGISTRAR

GWid : G40155276
Date of Birth: 21-NOV
Record of: Caroline Uehling

Date Issued: 05-JUN-2023
Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS

Fall 2023				
LAW 6538	Immigration Law	3.00	-----	
LAW 6633	Civil And Human Rights Clinic	6.00	-----	
LAW 6658	Law Review	1.00	-----	
LAW 6683	College Of Trial Advocacy	3.00	-----	
Credits In Progress:		13.00		
***** TRANSCRIPT TOTALS *****				
Earned Hrs		GPA Hrs	Points	GPA
TOTAL INSTITUTION	57.00	50.00	182.00	3.640
OVERALL	57.00	50.00	182.00	3.640
##### END OF DOCUMENT #####				



Katie Cloud
Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit <http://go.gwu.edu/corcorantranscriptkey>

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I/ and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-.

Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt; CN/P, Conditional converted to Pass; CN/F, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

For historical information not included in the transcript key, please visit

<http://www.gwu.edu/transcriptkey>

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

Gwid : G40155276

Date of Birth: 21-NOV

Date Issued: 05-JUN-2023

Record of: Caroline Uehling

Page: 1

Student Level: Undergraduate
Admit Term: Fall 2017Issued To: CAROLINE UEHLING
CAROLINEUEHLING@GWU.EDU

REFNUM:5606526

Current College(s):Columbian Coll of Arts & Sci
Current Major(s): History
Political ScienceDegree Awarded: Bachelor of Arts 16-MAY-2021
summa cum laude
Departmental HonorsMajor: History
Major: Political Science

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS

NON-GW HISTORY:				

Fa2017	Advanced Placement Exam Credit			
GEOL 1099	Variable Topics	3.00	TR	
HIST 1011	World History, I500-Present	3.00	TR	
HIST 1120	European Civ In World Context	3.00	TR	
HIST 1310	Intro To American History	3.00	TR	
HIST 1311	Intro To American History	3.00	TR	
MATH 1231	Single-Variable Calculus I	3.00	TR	
MATH 1232	Single-Variable Calculus II	3.00	TR	
PSC 1002	Intro-American Politics & Govt	3.00	TR	
PSYC 1001	General Psychology	3.00	TR	
STAT 1051	Intro-Business & Economic Stat	3.00	TR	
UW 1099	Variable Topics	3.00	TR	
Transfer Hrs: 33.00				

SPRING 2020 Butler University				
PSC 2099	Critical Terrorism Studies	7.50	TR	
PSC 2099	Political Order & Violence Me	7.50	TR	
Transfer Hrs: 15.00				
Total Transfer Hrs: 48.00				

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2017				
Columbian Coll of Arts & Sci Arts & Sciences				
ARAB 1001	Beginning Arabic I	4.00	B+	13.20
ECON 1011	Principles Of Economics I	3.00	A-	11.10
HIST 2322	U.S. History Since I945	3.00	A	12.00
HIST 3811	Middle East In 20th Century	3.00	A	12.00
MUS 1083	University Band	1.00	P	0.00
PSC 1001	Intro To Comparative Politics	3.00	A-	11.10
Ehrs 17.00 GPA-Hrs 16.00 Pts 59.40 GPA 3.71				
CUM 17.00 GPA-Hrs 16.00 Pts 59.40 GPA 3.71				
Good Standing				

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS

Spring 2018				
Columbian Coll of Arts & Sci Arts & Sciences				
ARAB 1002	Beginning Arabic II	4.00	B+	13.20
HIST 3044W	Thepriceoffreedom:Normandy1944	4.00	A	16.00
LSPA 1049	Boxing	1.00	P	0.00
MUS 1083	University Band	1.00	P	0.00
PSC 1003	Intro-International Politics	3.00	A	12.00
UW 1020	University Writing	4.00	A	16.00
Ehrs 17.00	GPA-Hrs 15.00 Pts	57.20	GPA	3.81
CUM 34.00	GPA-Hrs 31.00 Pts	116.60	GPA	3.76
Good Standing				
Dean's List				

Fall 2018

ARAB 2001	Intermediate Arabic I	4.00	B+	13.20
GEOL 1005	Environmental Geology	3.00	A	12.00
HIST 2340W	U.S. Diplomatic History	3.00	B+	9.90
HIST 3030	Military History To I860	3.00	A	12.00
LSPA 1059	Cycling	1.00	P	0.00
MUS 1083	University Band	0.00	P	0.00
PSC 2476	The Arab-Israeli Conflict	3.00	A	12.00
Ehrs 17.00	GPA-Hrs 16.00 Pts	59.10	GPA	3.69
CUM 51.00	GPA-Hrs 47.00 Pts	175.70	GPA	3.74
Good Standing				

Spring 2019

Columbian Coll of Arts & Sci History Political Science				
ARAB 2002	Intermediate Arabic II	4.00	A-	14.80
HIST 3031	Military History Since I815	3.00	A	12.00
HIST 3095	Internship	1.00	A	4.00
HIST 3137	The British Empire	3.00	A	12.00
MATH 1007	Mathematics And Politics	3.00	A	12.00
MUS 1083	University Symphonic Band	0.00	P	0.00
PSC 2377	Comp. Pol. Of The Middle East	3.00	A	12.00
Ehrs 17.00	GPA-Hrs 17.00 Pts	66.80	GPA	3.93
CUM 68.00	GPA-Hrs 64.00 Pts	242.50	GPA	3.79
Good Standing				
Dean's List				

***** CONTINUED ON PAGE 2 *****



Katie Cloud
Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

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Date of Birth: 21-NOV

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Record of: Caroline Uehling

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
Fall 2019				
ARAB 3001	Advanced Arabic	4.00	A	16.00
HIST 2804	History Of Ancient Israel	3.00	A	12.00
MUS 1083	University Band	1.00	P	0.00
PSC 2240	Poverty, Welfare, And Work	3.00	A	12.00
PSC 2367	Human Rights	3.00	A	12.00
PSC 2440	Theories Of Int'L Politics	3.00	A-	11.10
Ehrs	17.00	GPA-Hrs	16.00	Pts 63.10 GPA 3.94
CUM	85.00	GPA-Hrs	80.00	Pts 305.60 GPA 3.82
Good Standing				
Dean's List				

Spring 2020

EXCH 0007	Undergraduate Study Abroad	0.00	SB	0.00
Ehrs	0.00	GPA-Hrs	0.00	Pts 0.00 GPA 0.00
CUM	85.00	GPA-Hrs	80.00	Pts 305.60 GPA 3.82
Good Standing				
...				
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION.				

Fall 2020

ENGL 1210	Intro To Creative Writing	3.00	A	12.00
HIST 2805W	Plague In Islamic History	3.00	A	12.00
PSC 2101	Scope & Methods In Psc	3.00	A	12.00
PSC 2105	Western Political Thought I	3.00	A-	11.10
PSC 3192W	Ethnic Conflict&Peace Building	3.00	A	12.00
Ehrs	15.00	GPA-Hrs	15.00	Pts 59.10 GPA 3.94
CUM	100.00	GPA-Hrs	95.00	Pts 364.70 GPA 3.84
Good Standing				
Dean's List				

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
Spring 2021				
BISC 1006	Ecology/Evolution Of Organisms	3.00	A	12.00
HIST 3062	War Crimes Trials	3.00	A	12.00
HIST 3825	Land&Power In Israel/Palestine	3.00	A	12.00
HIST 4099W	Senior Honors Thesis Tutorialw	3.00	A	12.00
Ehrs	12.00	GPA-Hrs	12.00	Pts 48.00 GPA 4.00
CUM	112.00	GPA-Hrs	107.00	Pts 412.70 GPA 3.86
Good Standing				
Dean's List				

***** TRANSCRIPT TOTALS *****
Earned Hrs GPA Hrs Points GPA

TOTAL INSTITUTION 112.00 107.00 412.70 3.86

TOTAL NON-GW HOURS 48.00 0.00 0.00 0.00

OVERALL 160.00 107.00 412.70 3.86

***** END OF DOCUMENT *****



Katie Cloud
Katie Cloud
Interim University Registrar

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Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

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1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
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001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and

School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

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THE WASHINGTON METROPOLITAN AREA

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GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I/ and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-.

Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt; CN/P, Conditional converted to Pass; CN/F, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

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June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Caroline Uehling is a thoughtful and engaged law student who leans into hard work. She will be a valuable addition to whatever field of law she chooses to pursue, and any legal employer would be lucky to have her.

Caroline was one of the best students in the “Domestic Terrorism” class that I co-taught at George Washington University’s Law School. The class was a seminar that focused on crafting practical policy solutions that would pass legal muster. My co-professor and I are adjuncts. Our day jobs are at the Department of Justice’s National Security Division, where we both focus on domestic terrorism. Caroline contributed greatly to the class, and to her classmates. She was not always the most talkative student—a relatively easy feat, in any event—but she was consistently one of the most thoughtful—a far harder challenge.

The rapidly evolving, multifaceted nature of the domestic terrorism threat admittedly makes for a challenging class. Our students not only had to master the basics of applicable criminal law, but also become quick-study experts in subject matters ranging from First Amendment protections to the bureaucracy of the national security state to some of the worst moments in American history. Furthermore, for their final project, students could not simply regurgitate the debates they had in class, but had to undertake significant additional research to complete a lengthy paper on a topic of their choosing.

For her paper, Caroline chose to tackle not one but two complex areas: the scope of the First Amendment as it relates to responses to domestic terrorism, and how that scope compares to the laws and practices of our close counterterrorism ally, the United Kingdom. Relying on a robust array of governmental, judicial, and academic sources from both here and across the pond, Caroline did an excellent job and earned one of the top grades in the class. I was especially impressed by her ability to incorporate principles from international agreements such as the International Convention on Civil and Political Rights in making her arguments concerning social media regulations. The paper displayed Caroline’s passion for international law, a topic in which I understand she has excelled in other classes as well.

In short, Caroline is a cogent and cheerful legal thinker who shows great promise.

Please do not hesitate to contact me for any further information.

Sincerely,

Colin T. Ross
Attorney Advisor, Office of Law & Policy
National Security Division, U.S. Dep’t of Justice
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June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Caroline "Carly" Uehling for a clerkship. Carly is a bright and capable second year law student who would be an invaluable asset your chambers.

Carly was my student in my first year Fundamentals of Lawyering class at The George Washington University Law School. This is a year-long course and she was one of 16 students in this small class. I have gotten to know Carly well both inside and outside the classroom during her first two years at GW. I feel qualified to appraise her writing skills, analytical ability, professional judgment, and work ethic, among other qualities.

Carly's academic credentials speak for themselves: she is a summa cum laude graduate of The George Washington University and a Thurgood Marshall Scholar at GW Law. She certainly has the aptitude and acumen for a clerkship and, in my view, the personal characteristics as well.

Fundamentals of Lawyering encompasses the traditional legal research and writing curriculum, but filters it through a client service lens. Students represent a "client" in the fall and the spring and focus on "solving a problem" for their client and communicating those solutions. Carly is a strong writer and a sound analytical thinker. She's a particularly strong predictive writer and her objective memos are clear, concise, and structured well. She's therefore particularly well-suited to writing bench memos and judicial opinions.

Carly noted that she was "not a particularly talkative person." Over the course of the year, however, she came out of her shell and made thoughtful contributions to class without prompting. Her quiet, humble, unassuming demeanor is, in a word, refreshing and I have seen her quiet confidence grow in the time I have known her. She is a listener and observer rather than a talker, but through her writing and her class contributions when called upon, she makes clear that she does not miss a beat.

Indeed, she was one of the two strongest writers in my section and I nominated her to be an upper level Writing Fellow to assist first year students with their writing. In this capacity, she worked one-on-one to mentor and tutor students on their writing assignments. She thrived in that role and many first year students returned to her throughout the year to seek more advice.

On a personal note, Carly is a quiet leader in the classroom who is liked and respected by her peers. She was a thoughtful contributor to class discussions and a cooperative team player during group exercises. Carly excels at giving her peers feedback on their written work to make it stronger and always receives feedback thoughtfully on her own writing.

Outside of law school, Carly loves baseball (especially the Phillies) and recently traveled to Florida for Spring Training. She plays the trombone, gardens, and propagates plants. Carly's grandfather, a D-Day survivor, inspired her interest in World War II history. Her favorite class in her undergraduate studies was about the history of the Normandy invasion and she interned at the Albert H. Small Institute. I highlight these diverse interests because with Carly, there is more than meets the eye. And speaking to her always reveals a different interest that she engages with beyond the surface level.

When I asked Carly why she came to law school, she wrote: "I think lawyers have far more agency to respond to certain problems facing the country/world than people without an understanding of our legal system." Her awareness of a lawyer's responsibility to the profession belies her young age and relative lack of legal experience. I think this quote captures the thoughtfulness and intentionality with which Carly approaches her legal studies.

Carly's skills and personality traits will make Carly a successful clerk and the type of lawyer our profession needs more of. I recommend her without reservation. If I can provide more information about her qualifications, please do not hesitate to contact me.

Sincerely,

Erika N. Pont

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June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write with great enthusiasm to recommend Caroline “Carly” Uehling for a clerkship in your chambers. Carly took my Evidence course in Fall 2022, and was a standout student in class, with unfailingly well-timed and on-point comments. She also received an excellent grade in the class, performing in the top 15–20% of a highly competitive 80-person class. She excelled on the multiple choice questions (relatively straightforward applications of evidence law), the hypothetical questions (very complex issue-spotters), and the policy question (which required in-depth application of the law to a real-world issue). It is unusual for a student to do so well on all three types of writing and thinking, especially under tight time pressure.

I have had the opportunity to talk with Carly on a number of occasions about her goals and interests. One of the experiences from which she has learned the most is her work in the U.S. District Court for the District of Maryland in Baltimore, where worked this past summer. In that capacity, she had an opportunity to draft orders and memoranda, and developed a particular facility for prisoners’ civil rights cases—a testament to her ability to parse complex legal issues.

Additionally, beginning while she was an undergraduate and continuing into law school, Carly has spent several months at Gilbert Employment Law. Gilbert is a medium-sized law firm in Silver Spring, Maryland that handles a range of employment issues, including EEOC matters, whistleblower claims, and other employment matters in both the public and private sector. Carly began working there in 2018, and over the numerous stints she has spent at the firm, Carly has been entrusted with increasingly important matters. She began by organizing documents and sitting in on client meetings, and by 2021, she was conducting initial consultations, taking depositions, and meeting with clients herself. Carly’s dedication to the firm, and her interest in working closely with the same group of people over time, illustrates something powerful about the way I believe she would contribute to a productive work atmosphere in chambers: when Carly becomes part of something, she is extremely dedicated to it. This summer, Carly will be taking on a particularly challenging job, working for the Military Commissions Defense organization on the defense team for a detainee at Guantanamo Bay. Her interest in challenging herself and taking on new experiences and increasingly complex cases will also serve her well as a clerk.

Over her time in law school, Carly has sought out and excelled in many different activities and experiences. She was selected as Articles Editor of The George Washington Law School Law Review, which is a particularly important and challenging role on a prestigious journal. In this capacity, she has fine-tuned her editing skills and also become familiar with a wide range of legal scholarship, practice areas, and writing styles. Additionally, she works as both a Writing Fellow and a Civil Procedure tutor; a Research Assistant to Professor Miriam Galston, and also volunteers for the International Refugee Assistance Project. This range of commitments is impressive for its number, but even more so for its range. It has allowed Carly to cultivate a broad variety of strengths that will serve her well as a lawyer, including her written skills, analytical skills, research skills, and interpersonal skills as a collaborator.

Carly’s academic prowess is also evidenced in her GPA, which has been consistently solid every semester; this performance is particularly impressive given her selection of challenging doctrinal classes: Administrative Law, International Law, Evidence, Criminal Procedure, and many others. Carly has been named a Thurgood Marshall Scholar (ranked in the top 16%–35% of students in her class) every semester so far in law school. The consistency of her performance is typical of everything I know about her: Carly comes to every class, meeting, and experience extremely well-prepared. Her manner is extremely low-key, friendly, and collaborative, and she strikes me as a person who works hard, possesses a keen intelligence, and is not easily ruffled.

In sum, Carly is precisely the sort of clerk I would want in chambers. I am happy to elaborate further if you think it would be useful. My cell number is (650) 862-5194. Please feel free to email or call any time.

Sincerely yours,

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Caroline Uehling

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Writing Sample

The following writing sample is an excerpt of my Note entitled: “Dropped Third Strike? Preparing the Prison Litigation Reform Act for the Next Pandemic.” I found inspiration for this topic while reviewing prisoner civil rights complaints during my summer internship with the Prosecutive Staff Attorney’s Office for the U.S. District Court for the District of Maryland. I omitted Part III, which proposes a judicial and legislative solution to the problems outlined in the previous two parts. While the work is entirely mine, I received minor feedback from my professor, my Notes Editor, and peers as part of the regular Note-writing process.

*“Like much of society, these residents watched the news and saw the President of the United States and the Governor of New Jersey imploring – and in some instances requiring – all Americans to practice ‘social distancing,’ to avoid congregating in groups, to wash their hands and use hand sanitizer regularly, to disinfect frequently touched surface, and to seek prompt medical attention if symptoms develop. Unlike the rest of society... DOC residents cannot.”*¹

Introduction

When the COVID-19 pandemic broke out in the United States in March 2020, prisons and jails were by their nature particularly susceptible to the spread of the virus.² Prisons and jails are frequently overcrowded and have limited access to quality healthcare.³ The simplest way to reduce potential spread in prisons was through reducing the prison population, and while many state prisons notably lowered their populations, they achieved this primarily through reduced prison admissions rather than increased releases.⁴ Even states with reduced prison populations were not able to accommodate social distancing and quarantine.⁵ The death rate from COVID-19 in prisons during its first year reaching twice that of the death rate in the general U.S. population reflected the severe cost of the failure to stop the spread of the virus in prisons.⁶

When prison conditions are particularly deficient, incarcerated people can invoke the Eighth Amendment’s protections against cruel and unusual punishment.⁷ Historically, incarcerated people challenged prison conditions under the Civil Rights Act of 1871, 42 U.S.C. § 1983, which authorizes lawsuits against state or local officials who violate constitutional rights

¹ Complaint at 4-5, *Brown v. Warren*, No. 1:20-cv-07907-NLH-AMD (D. N.J. June 26, 2020).

² *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, THE BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> (Mar. 27, 2020).

³ *Id.*

⁴ Emily Widra, *State prisons and local jails appear indifferent to COVID outbreaks, refusing to depopulate dangerous facilities*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/blog/2022/02/10/february2022_population/ (Feb 10, 2022).

⁵ *Id.*

⁶ *Id.*

⁷ U.S. CONST. amend. VIII.

while acting under the color of the law.⁸ However, in recent decades, it has become increasingly difficult for incarcerated people to turn to federal courts to vindicate their constitutional rights.⁹

The Prison Litigation Reform Act (“PLRA”), which passed in 1996, severely curtailed the recourse of prisoners in federal courts.¹⁰ Because Congress worried that it was easy for prisoners to bog down federal courts with frivolous lawsuits, it created new barriers such as an administrative exhaustion requirement and a requirement that indigent plaintiffs proceeding *in forma pauperis*¹¹ pay all filing fees through a payment plan.¹² Most notably for the purposes of this Note, it also created a “three strike” rule.¹³ If plaintiffs have three lawsuits dismissed for being frivolous, malicious, or failing to state a claim, they can no longer utilize *in forma pauperis* status, even though the initial suits certified their inability to pay.¹⁴ Some circuits interpret this provision broadly, considering even dismissals under *Heck v. Humphrey*, which requires plaintiffs to successfully challenge their criminal convictions before raising § 1983 claims about the same circumstances,¹⁵ to be dismissals for failure to state a claim.¹⁶ Furthermore, although the PLRA creates an exception to the three-strike requirement when there is imminent danger to the plaintiff,¹⁷ it creates no similar exception for special circumstances or

⁸ William H. Danne, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3d 111.
⁹ See, e.g., Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, CORRECTIONAL LAW REPORTER, <https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Trends%20in%20Prisoner%20Litigation%20as%20the%20PLRA%20Approaches%2020.pdf>.

¹⁰ Rachel Poser, *Why It's Nearly Impossible for Prisoners to Sue Prisons*, THE NEW YORKER, <https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons> (May 30, 2016).

¹¹ Plaintiffs proceeding *in forma pauperis* are unable to provide security for the payment of the costs of the lawsuit due to poverty. In general, statutes ensure that such plaintiffs can file lawsuits by requiring the government to pay court fees or waiving the prepayment of fees. E.E. Woods, *What costs or fees are contemplated by statute authorizing proceedings in forma pauperis*, 98 A.L.R.2d 292 (2023).

¹² Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 70.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Heck v. Humphrey*, 512 U.S. 477, 478-479 (1994).

¹⁶ *Garrett v. Murphy*, 17 F.4th 419 (3rd Cir. 2021); *Teagan v. City of McDonough*, 949 F.3d 670, 677 (11th Cir. 2020); *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019).

¹⁷ 28 U.S.C. § 1915(g).

public health crises.¹⁸ The Eleventh Circuit even interprets the PLRA to prevent the joinder of parties under Federal Rule of Civil Procedure (“FRCP”) 20,¹⁹ despite the lack of language in the PLRA supporting that provision.²⁰

This Note argues that the PLRA has created a legacy of not simply filtering the prisoner civil rights complaints that reach federal courts, but of barring meritorious claims. In particular, the three-strike provision prevents courts from exercising oversight over potentially unconstitutional conditions in prisons simply because a plaintiff raised complaints with deficiencies in the past.²¹ Although courts invoke the purposes of the PLRA when determining the application of the three-strike provision, the numerous circuit splits regarding application demonstrate the uncertainty of legislative intent in multiple contexts.²² Courts that broadly award litigants strikes and then bar prisoner plaintiffs from joining under FRCP 20 through their interpretation of the strike rule are not protecting federal courts from frivolous prisoner complaints. Instead, these interpretations hinder the practical process of raising legitimate claims. The COVID-19 pandemic demonstrates the importance of allowing legitimate conditions complaints to reach federal courts.²³ Additionally, conditions complaints against the broad treatment of inmates are well-suited for joinder. Judicial interpretation may be the only avenue for broadening access, but legislative action may be possible if Congress recognizes how inmate litigation can converge with the public interest. Because interpreting the three-strikes provision

¹⁸ See *infra* Part III.B.

¹⁹ *Hubbard v. Haley*, 262 F.3d 1194 (11th 2001).

²⁰ The three-strike provision does not address joinder. See 28 U.S.C. § 1915(g).

²¹ See The Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104–134, tit. VIII, 110 Stat. 1321 (1996) (codified in part at 28 U.S.C. § 1915) at § 1915(g).

²² 4 RICHARD D. FREER, *FEDERAL PRACTICE - CIVIL* § 20.10 (2023).

²³ See Margo Schlanger & Betsy Ginsberg, *AEDPA and the PLRA After 25 Years: Pandemic Rules: COVID-19 and the Prison Litigation Reform Act’s Exhaustion Requirement*, 72 CASE W. RES. 533, 562–563 (2022) (arguing that “justice requires” easing the administrative exhaustion requirement of the PLRA during emergency circumstances because failed COVID-19 legislation shows how the PLRA closed courthouse doors to important complaints).

of the PLRA broadly halts potentially meritorious, important complaints before they reach federal courts, courts should not count *Heck* dismissals as strikes and Congress should create a specific exception to the three-strike provision for plaintiffs joined to raise public health-related conditions complaints.

Part I of this Note describes COVID-19 in prisons and outlines the passage, provisions, and general criticism of the PLRA. Part II details the three-strike provision, questions about how the provision applies to certain types of dismissals and the Supreme Court's ruling in *Heck v. Humphrey*, and the debate over applying FRCP 20 to prison litigation following the PLRA. Part III proposes that courts should adopt a narrow interpretation of the three-strike provision and that Congress should enact an exception to the three-strike provision for specific joint litigation, which would allow incarcerated individuals to both hold officials accountable when their conditions are unexpectedly imperiled and protect the wider community.

I. COVID-19 in Prisons and The Prison Litigation Reform Act

When the coronavirus entered jails and prisons, the inherent conditions of incarceration made transmission likely and many officials lacked resources to even begin taking preventative measures.²⁴ Although the prison litigation that arose out of these circumstances theoretically presented just the type of inconvenience Congress anticipated when creating the PLRA,²⁵ Congress failed to anticipate that prison conditions do not simply harm incarcerated individuals.²⁶ Prisons are not isolated from the outside world, and problems like infectious diseases that proliferate in prisons will spread to the deficient infrastructure of the surrounding

²⁴ *Covid-19's Impact on People in Prison*, EQUAL JUSTICE INITIATIVE (Apr. 16, 2021) <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

²⁵ The declared purpose of the PLRA was to help overburdened courts. Schlanger, *Inmate Litigation*, *supra* note 9, at 1565-1566.

²⁶ The passage of the PLRA focused on litigants and courts, not the wider impact of litigation. *See id.*

communities.²⁷ This Part will explain the impact of the coronavirus on prisons, attempts at § 1983 coronavirus suits, and the passage and impact of the PLRA.

A. COVID-19 in Prisons

Incarcerated individuals are particularly vulnerable to communicable diseases due to the inherent conditions of their confinement, and that problem was exacerbated in the early months of the COVID-19 pandemic.²⁸ Data collected by The Marshall Project and The Associated Press suggested that by December 2020, one in every five federal and state prisoner had contracted the coronavirus.²⁹ According to the Bureau of Justice Statistics, between March 2020 and February 2021, approximately 2,500 state and federal prisoners died of COVID-19-related cases.³⁰ Forty-four percent of COVID-19-related deaths were white incarcerated individuals, while thirty-four percent were Black individuals.³¹ During this period 396,300 viral tests were positive, accounting for an 8.2 percent positive rate in state and federal prisons.³²

The prison population presented a unique challenge in the United States because of its disproportionate size and particular vulnerability.³³ Although countries throughout the world faced questions about how to prevent the spread of a virus in confined correctional

²⁷ Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. TIMES (March 31, 2020) <https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html?searchResultPosition=1>.

²⁸ *Covid-19's Impact on People in Prison*, Equal Justice Initiative (Apr. 16, 2021) <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

²⁹ Beth Schwartzapel, Katie Park, & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, THE MARSHALL PROJECT (Dec. 18, 2020) <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>.

³⁰ BUREAU OF JUSTICE STATISTICS, IMPACT OF COVID-19 ON STATE AND FEDERAL PRISONS, MARCH 2020-FEBRUARY 2021, 1 <https://bjs.ojp.gov/library/publications/impact-covid-19-state-and-federal-prisons-march-2020-february-2021>.

³¹ *Id.* at 1.

³² *Id.*

³³ See Benjamin A. Barsky et. al., *Vaccination plus Decarceration—Stopping Covid-19 in Jails and Prisons*, N. ENGL. J. OF MED. 1583 (2021); Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population is So Vulnerable to COVID-19*, THE MARSHALL PROJECT (March 19, 2020) <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

environments, U.S. jails and prisons were responsible for twenty-five percent of the world's incarcerated individuals.³⁴ In addition to the tight quarters of prisons, there was also constant movement that encouraged the spread of the virus.³⁵ Public health experts urged that the most effective way to prevent the spread of COVID-19 in prisons was through decarceration; early statistics indicated that decarceration did not lead to an increase in rearrest rates, and diminishing the spread of the virus had the greatest impact on the health and safety of the communities near prisons.³⁶ For example, a nine percent reduction in the carceral population was associated with a fifty-six percent decrease in transmission.³⁷ Public health experts warned that extensive measures were necessary because even when vaccines became available, it would not guarantee an end to the virus within prisons.³⁸ If incarcerated individuals were prioritized in vaccine rollouts, even highly effective vaccines could not prevent the spread of viruses completely in “high-spread, congregate settings.”³⁹ Furthermore, incarcerated individuals would be particularly likely to be vaccine hesitant, as they had reduced access to information and a distrust of the institution responsible for their incarceration.⁴⁰

The United States also faced the challenge of an aging prison population that was more susceptible to complications from contracting the virus.⁴¹ Although in the past young adults between the ages of eighteen and twenty-four made up a larger percentage of the state prison population, this changed as the population of state prisons, incarcerated from the harsh sentencing laws of the 1980s and 1990s, aged.⁴² In fact, the percentage of people in state prisons

³⁴ Barsky, *supra* note 33 at 1583.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1585.

³⁸ *Id.* at 1584.

³⁹ *Id.*

⁴⁰ *Id.* at 1584-1585.

⁴¹ Li & Lewis, *supra* note 33.

⁴² *Id.*

fifty-five and older tripled between 2000 and 2016.⁴³ Compounding this issue, older individuals were also more likely to have chronic conditions, which correctional facilities frequently lacked the resources to treat.⁴⁴

In response to the pandemic, the Center for Disease Control (“CDC”) issued guidance for people living in jails and prisons.⁴⁵ The guidance recommended that incarcerated individuals get vaccinated; maintain physical distance by avoiding crowds and distancing during recreation, mealtime, and when walking in hallways; wear a mask when around staff or people from a different housing unit; and wash hands with soap and water for twenty seconds.⁴⁶ In recognition of the abundant common areas in prisons, the CDC recommended going outside for recreation time and sleeping head to foot if there was more than one bed in the room.⁴⁷ However, these measures, minimal to begin with, were not always implemented in practice.⁴⁸

The impact of the high transmission rate of the coronavirus among incarcerated individuals spread beyond the walls of prisons.⁴⁹ There is enormous turnover in jails, which have a far less stable population than prisons; on average, 200,000 people enter jails and about the same number exit jails every week.⁵⁰ Contact with non-incarcerated individuals is unavoidable, as workers must interact with incarcerated people.⁵¹ In small towns that house prisons, large

⁴³ *Id.* In this article, Li and Lewis note that 2016 is the most recent date when this detailed data is available. The data is, however, indicative of the present trend in correctional populations.

⁴⁴ *Id.*

⁴⁵ CENTER FOR DISEASE CONTROL, FOR PEOPLE LIVING IN PRISONS AND JAILS (Sept. 3, 2021) <https://permaent.fdip.gov/gpo159641/www.cdc.gov/coronavirus/2019-ncov/downloads/needs-extra-precautions/For-People-Living-in-Prisons-and-Jails.pdf>.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 3.

⁴⁸ *Infra* Part I.B.

⁴⁹ See Flagg & Neff, *supra* note 27.

⁵⁰ *Id.*

⁵¹ *Id.*

percentages of the population work in the prisons.⁵² Small towns also often have poor health infrastructure, which leads to high mortality rates even during times that do not constitute public health emergencies.⁵³ Throughout the COVID-19 pandemic, prisoner litigants have attempted to halt the pandemic's impact by filing civil rights lawsuits.⁵⁴

B. COVID-19 § 1983 Lawsuits

In response to inadequate housing conditions during the pandemic in jails and prisons, many incarcerated individuals brought civil rights claims under § 1983.⁵⁵ In June 2020, eight inmates asserted that the Cumberland County Correctional Facility in New Jersey failed to provide staff with adequate cleaning supplies, instead relying on the Department of Corrections (“DOC”) residents to clean personal and common areas without provisions of masks, gloves, or other equipment.⁵⁶ Given no cleaning supplies, residents were told to clean their cells with water and their own soap and towels used for bathing.⁵⁷ Additionally, the plaintiffs noted that despite residents exhibiting symptoms, they did not receive COVID-19 tests.⁵⁸ Facility officials then made statements about no inmates testing positive.⁵⁹ Social distancing was impossible because

⁵² In the town of Homer, Louisiana, the population is 3,000: 1,244 individuals are incarcerated and 350 people work in the prison. Jonathan Ben-Menachem, *Coronavirus Exposes Precarity of Prison Towns*, THE APPEAL (Apr. 21, 2020) <https://theappeal.org/coronavirus-prison-towns/>.

⁵³ *Id.*

⁵⁴ See Brown v. Warren, No. 1:20-cv-07907-NLH-AMD (D. N.J. June 26, 2020); Complaint, Maney v. Brown, No. 6:20-cv-00570-SB (D. Or. Apr. 6, 2020); Complaint, Frazier v. Kelley, No. 4:20-cv-00434 (E.D. Ark. Apr. 21, 2020); Complaint, Waddell v. Taylor, No. 5:20-cv-00340 (S.D. Miss. May 14, 2020); Complaint, Hanna v. Peters, No. 2:21-cv-00493-SB (D. Or. Apr. 1, 2021).

⁵⁵ See Brown v. Warren, No. 1:20-cv-07907-NLH-AMD (D. N.J. June 26, 2020); Complaint, Maney v. Brown, No. 6:20-cv-00570-SB (D. Or. Apr. 6, 2020); Complaint, Frazier v. Kelley, No. 4:20-cv-00434 (E.D. Ark. Apr. 21, 2020); Complaint, Waddell v. Taylor, No. 5:20-cv-00340 (S.D. Miss. May 14, 2020); Complaint, Hanna v. Peters, No. 2:21-cv-00493-SB (D. Or. Apr. 1, 2021).

⁵⁶ Brown v. Warren, No. 1:20-cv-07907-NLH-AMD, at 12.

⁵⁷ *Id.*

⁵⁸ *Id.* at 14.

⁵⁹ *Id.*

cells housed two people and the only time inmates could leave their cells was to be in common areas, where congregation was inevitable.⁶⁰

While some § 1983 lawsuits focused on prisons' initial COVID-19 response,⁶¹ others stated that correctional facilities failed to respond to the needs of inmates as the pandemic continued.⁶² In Oregon, a plaintiff wrote that despite DOC policies mandating prison staff to wear masks when interacting with inmates, staff of the Two Rivers Correctional Institute disregarded the instructions and superiors made no attempt to enforce the requirements.⁶³ Furthermore, the prison implemented “pat down” procedures when inmates waited in halls for meal, which led to unmasked officers moving from inmate to inmate while wearing the same gloves.⁶⁴

Although these suits are all ongoing, many similar lawsuits ran into the barriers imposed by the PLRA.⁶⁵ Plaintiffs barred from bringing claims under the PLRA due to their past filing history cannot reach an adjudication on the merits of their conditions complaints.⁶⁶

C. The “Explosion” of Prison Litigation and the Passage of the PLRA

There are several avenues through which incarcerated people can pursue litigation in federal court either by challenging their convictions or the conditions of their incarceration.⁶⁷

⁶⁰ *Id.* at 15.

⁶¹ See Complaint, Maney v. Brown, No. 6:20-cv-00570-SB (D. Or. Apr. 6, 2020); Complaint, Frazier v. Kelley, No. 4:20-cv-00434 (E.D. Ark. Apr. 21, 2020); Complaint, Waddell v. Taylor, No. 5:20-cv-00340 (S.D. Miss. May 14, 2020).

⁶² See Complaint at 6, Hanna v. Peters, No. 2:21-cv-00493-SB (D. Or. Apr. 1, 2021).

⁶³ *Id.*

⁶⁴ *Id.* at 4.

⁶⁵ See, e.g., Garrett v. Murphy, 17 F.4th 419 (3rd Cir. 2021); Schlanger & Ginsberg, *supra* note 23, at 537 (describing how the PLRA's exhaustion requirement halted COVID-19 lawsuits).

⁶⁶ *No Equal Justice: The Prison Litigation Reform Act in the United States*, THE APPEAL <https://theappeal.org/the-lab/explainers/how-the-prison-litigation-reform-act-has-failed-for-25-years/>.

⁶⁷ Federal district courts can grant writs of habeas corpus when a prisoner “is in custody in violation of the Constitution or laws or treaties of the United States.” Michael L. Zuckerman, *When the Conditions are the Confinement: Eighth Amendment Habeas Claims During COVID-19*, 90 U. CIN. L. REV. 1, 6 (2021) (citing 28 U.S.C. § 2241(a)). Inmate civil rights litigation often involves complaints of physical assaults by other inmates or staff, inadequate medical care, disciplinary actions lacking adequate due process, and generally poor living-conditions, but complaints sometimes refer to freedom of religion or speech.

Most relevantly, prisoners can bring lawsuits when their rights were deprived by a state actor under 42 U.S.C. § 1983, which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .⁶⁸

Under § 1983, individuals can sue defendants acting on behalf of the state or local government.⁶⁹

Although people can bring § 1983 suits against local or state officials for many reasons, such as the violation of Fourth or Eighth Amendment rights during an arrest, the statute is particularly significant for individuals incarcerated in state prisons, who can bring claims against the officials operating those prisons.⁷⁰ Prisoners can bring civil rights complaints under § 1983 if they experience cruel and unusual punishment in violation of either their constitutional rights under the Eighth Amendment, in the case of incarcerated individuals, or under the Fourteenth Amendment, in the case of pretrial detainees.⁷¹

Congress determined it needed to modify this process, however, because the latter half of the twentieth century saw a marked increase in the number of § 1983 suits and related federal lawsuits.⁷² In 1970, there were 2,244 prisoner civil rights complaints filed in federal district

Schlanger, *Inmate Litigation*, supra note 9, at 1571. Although inmates used both avenues during the pandemic, this Note focuses on civil rights litigation, which provides different remedies than habeas petitions.

⁶⁸ 42 U.S.C. § 1983.

⁶⁹ *Id.* These are distinct from suits against federal employees, which are *Bivens* actions. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁷⁰ *Helling v. McKinney*, 509 U.S. 25 (1993).

⁷¹ *Helling v. McKinney*, 509 U.S. 25 (1993) (alleging that defendants, with deliberate indifference, exposed plaintiff to unreasonable risks for future health stated Eighth Amendment claim for which relief could be granted); *Hutto v. Finney*, 437 U.S. 678 (1978) (finding conditions in prison system constituted cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).

⁷² BERNARD D. REAMS, JR. AND WILLIAM H. MANZ, *Introduction, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996*, at iii (1997).

courts.⁷³ By 1995, that number increased to 39,053.⁷⁴ At the same time, the total incarcerated population in the United States grew from 359,419 to 1,597,044.⁷⁵ Therefore, the rate of filings per 1,000 incarcerated people grew from 6.2 to 24.5 filings.⁷⁶ Due to the screening burden prison litigation, which was usually filed *pro se* and *in forma pauperis* and decided during pleading stages, placed on district courts, Congress determined that legislation was necessary to improve case management.⁷⁷ In 1996, Congress passed the PLRA with the intention of curbing an increase in prison litigation.⁷⁸ However, it was somewhat misguided in attributing the increased burden on federal courts entirely on lawsuits from incarcerated individuals. Rather, the tripling of the U.S. prison and jail population from 1980 to 1995 burdened the capacity of federal courts to address prison litigation, not simply an increased desire to litigate from the prison population.⁷⁹ The filing rate actually declined in the 1980s after rising in the 1970s, but the filing rates rose again between 1990 and 1995.⁸⁰ Even when filing rates rose, prisoners were filing lawsuits at a similar rate to non-incarcerated people while being exposed to more potentially dangerous situations.⁸¹

The legislation both barred lawsuits and made positive outcomes less likely.⁸² To prevent prisoners from attempting to bring lawsuits, the PLRA increased filing fees, prevented

⁷³ *Id.*; Margo Schlanger, *Incarcerated Population and Prison/Jail Civil Rights/Conditions Filings, FY 1970 – FY 2021*, INCARCERATION LAW, <https://incarcerationlaw.com/resources/data-update/#TableA>.

⁷⁴ Schlanger, *Incarcerated Population and Prison/Jail Civil Rights/Conditions Filings, FY 1970 – FY 2021*, *supra* note 73.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Reams, *supra* note 72, at iii.

⁷⁸ *Id.*

⁷⁹ Easha Anand, Emily Clark & Daniel Greenfield, *How the Prison Litigation Reform Act Has Failed For 25 Years*, THE APPEAL, <https://theappeal.org/the-lab/explainers/how-the-prison-litigation-reform-act-has-failed-for-25-years/>; See Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 70-72.

⁸⁰ Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 70.

⁸¹ *No Equal Justice: The Prison Litigation Reform Act in the United States*, *supra* note 66.

⁸² Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 70.

individuals from filing until they had exhausted administrative remedies within the prison system, and implemented a three-strike rule requiring “frequent” lawsuit filers to produce filing fees regardless of their capacity to pay.⁸³ Moreover, it limited damages and attorney’s fees.⁸⁴ It also required plaintiffs to suffer a physical injury to recover monetary damages; mental or emotional injuries were not adequate.⁸⁵

Courts’ interpretations of the PLRA’s provisions have succeeded in curtailed both the filing and outcomes of prisoner suits.⁸⁶ The exhaustion rule requires that individuals seek accountability within the prison administrative system first, and courts largely discount the feasibility of prison grievances under the circumstances.⁸⁷ Although the Supreme Court has recognized that certain conditions make the administrative grievance process not “available” in practice, therefore waiving the requirement to exhaust, judges vary in their interpretation of what constitutes availability and sometimes require a high standard.⁸⁸ Following the PLRA’s passage, the average rate of filings per 1000 inmates decreased from a range of 20.0-24.9 from 1990-1996 to a range of 9.6-15.1 between 1997 and 2014.⁸⁹

Although critics of the PLRA acknowledge the reasonableness of limiting the number of frivolous claims in federal courts and maximizing the courts’ productivity, reports show that provisions of the PLRA have led to dismissals of claims regarding sexual assault, intentional abuse by prison staff, and other serious injuries.⁹⁰ Because the United States does not have an independent national agency to monitor conditions in prisons and jails like many other

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Anand, Clark, and Greenfield, *supra* note 79.

⁸⁶ See Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 71.

⁸⁷ Anand, Clark, and Greenfield, *supra* note 79.

⁸⁸ *Booth v. Churner*, 532 U.S. 731, 741 (2001); *Ross v. Blake*, 578 U.S. 632, 643 (2016).

⁸⁹ Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, *supra* note 9, at 71.

⁹⁰ Anand, Clark, and Greenfield, *supra* note 79.

democracies, federal courts play an important role in oversight and reform of conditions.⁹¹ Additionally, because convicted prisoners are barred from voting in the vast majority of states, the Supreme Court has noted that the right of prisoners to federal courts is even more important: “the right to file a court action might be said to be [a prisoner’s] remaining most fundamental political right, because preservative of all rights.”⁹² As prisoners cannot spur action through the executive or legislative branch, the judicial branch is the avenue that remains.

II. Defining and Interpreting the PLRA’s Three-Strike Rule

In 2020, Allen Dupree Garrett sued New Jersey state officials asserting that they kept him in pretrial detention with deliberate indifference to the imminent risk of contracting COVID-19, which violated his substantive due process rights.⁹³ He attempted to proceed *in forma pauperis*, which would allow the payment of filing fees over time.⁹⁴ However, this was not the first case Garrett attempted to file in federal court.⁹⁵ In 2014, he brought a § 1983 action challenging his prosecution, arrest, and conviction.⁹⁶ Three years later, Garrett brought a claim against his former defense attorneys and sentencing judge, and in 2019 he alleged a wrongful conviction.⁹⁷ Because of these entirely unrelated claims, which were unable to proceed under *Heck*, the Third Circuit determined that Garrett could not proceed *in forma pauperis*.⁹⁸ This Part details the three-strike rule, its interpretation, and its convergence with FRCP 20 and *Heck*.

⁹¹ Anand, Clark, and Greenfield, *supra* note 79.

⁹² *No Equal Justice: The Prison Litigation Reform Act in the United States*, *supra* note 66.

⁹³ Garrett v. Murphy, 17 F.4th 419, 423 (3rd Cir. 2021).

⁹⁴ *Id.*

⁹⁵ *Id.* at 426.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 433.

A. The Three Strike Provision

Under the PLRA, inmate litigants may file for *in forma pauperis* status if they are unable to pay filing fees.⁹⁹ While this allows them to not pay initial filing fees up front, they are still required to pay the full filing fee through monthly payments determined by monthly income.¹⁰⁰

The PLRA created additional barriers for “frequent filers,” requiring:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.¹⁰¹

In other words, an individual who has brought three unsuccessful claims—whether frivolous, malicious, or failing to state a claim—must pay filing fees upfront unless they are in imminent danger of serious physical injury.¹⁰² The three-strike rule seems to rest on the assumption that the filing fees required in prisoner complaints are not too much to deter a meritorious claim but are enough to deter a meritless claim.¹⁰³ When introducing the bill, Senator Jon Kyl argued that it was proper to require inmate litigants to pay filing fees, stating:

Section 2 will require prisoners to pay a very small share of the large burden they place on the Federal judicial system by paying a small filing fee upon commencement of lawsuit. In doing so, the provision will deter frivolous inmate lawsuits. The modest monetary outlay will force prisoners to think twice about the case and not just file reflexively. Prisoners will have to make the same decision that lawabiding Americans must make: Is the lawsuit worth the price?¹⁰⁴

⁹⁹ The Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104–134, tit. VIII, 110 Stat. 1321 (1996) (codified in part at 28 U.S.C. § 1915) at § 1915(g)

¹⁰⁰ 28 U.S.C. § 1915.

¹⁰¹ 28 U.S.C. § 1915(g).

¹⁰² *Id.*

¹⁰³ 141 CONG. REC. at S7526 (daily ed. May 25, 1995) (statement of Senator Kyl) (“The filing fee is small enough not to deter a prisoner with a meritorious claim, yet large enough to deter frivolous claims and multiple filings.”).

¹⁰⁴ *Id.* (citation omitted).

Kyl suggests that having to pay for lawsuits would prevent prisoners from “filing reflexively” and reduce the burden such individuals place on federal courts.¹⁰⁵ In reality, however, if courts deny plaintiffs *in forma pauperis* status based on three previous dismissals, it is unlikely that the plaintiffs can file a lawsuit, regardless of its potential merits.¹⁰⁶

Courts do not consider the filing fees imposed on prisoner litigants unconstitutional because Congress has historically controlled indigent litigant’s access to the federal judicial system and access to the courts is subject to Congress’s Article III power to limit federal jurisdiction.¹⁰⁷ As asserted by the Fourth Circuit in *Roller v. Gunn*, Congress created the first *in forma pauperis* statute in 1892 to give more Americans access to federal courts, but greater access led to more meritless lawsuits.¹⁰⁸ Congress recognized that the “explosion of [*in forma pauperis*] litigation” taxed the legal system and determined that the escalation of prisoner lawsuits derived from the “lack of economic disincentives to filing meritless cases.”¹⁰⁹ Congress’ power to create Article III courts does not compel it to guarantee free access or unlimited access.¹¹⁰ The Fourth Circuit insisted that if the fee regime under the PLRA was considered unconstitutional, all other court filing fees would also be unconstitutional.¹¹¹

Although the language of the PLRA is simple, its seemingly narrow provisions have wide implications that are unaddressed in its text.¹¹² The three-strike provision does not consider the length of an individual’s incarceration and bars entry without regard for whether litigation was undertaken in good faith, impacting truly frivolous claims to the same degree as claims

¹⁰⁵ *Id.*

¹⁰⁶ Anand, Clark, and Greenfield, *supra* note 79.

¹⁰⁷ *Roller v. Gunn*, 107 F.3d 227, 230 (4th Cir. 1997).

¹⁰⁸ *Id.* at 230.

¹⁰⁹ *Id.* at 230-231.

¹¹⁰ *Id.* at 231.

¹¹¹ *Id.* at 231-232.

¹¹² See Melissa Benerofe, *Collaterally Attacking the Prison Litigation Reform Act’s Application to Meritorious Prisoner Complaint Litigation*, 90 FDMLR 141, 164-165 (2021).

dismissed due to insufficiencies in pleading or procedural mistakes.¹¹³ The Supreme Court held that the provision refers to any dismissal for failure to state a claim whether the case is dismissed with prejudice or without.¹¹⁴

There are also extreme disparities across circuits about what constitutes a strike, especially due to the phrase “fails to state a claim.”¹¹⁵ For example, circuits disagree about whether dismissals based on absolute and qualified immunity, dismissals for failure to exhaust, and mixed dismissals based on a § 1915(g) ground (frivolous, malicious, fails to state a claim) and in part on other grounds qualify as strikes.¹¹⁶ The Third, Fourth, Seventh, Ninth, and District of Columbia Circuits determined that only dismissals based entirely on § 1915(g) grounds constitute strikes.¹¹⁷ Meanwhile, the Sixth and Tenth Circuits allow mixed dismissals, such as those based partly on failure to exhaust and partly on § 1915(g) grounds, to count as strikes.¹¹⁸

Although courts disagree about application, three-strike caselaw demonstrates that the purpose of the PLRA serves as a crucial tool for resolving ambiguity when the statute’s limited text lacks a plain meaning.¹¹⁹ The Third Circuit, for example, recognized that Congress intended the PLRA to conserve the resources of federal courts and defendants.¹²⁰ Because the target of the

¹¹³ *Id.*

¹¹⁴ *Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1723 (2020).

¹¹⁵ Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act’s ‘Three Strikes Rule,’* 28 U.S.C. § 1915(G), 28 CORNELL J.L. & POL’Y 207, 225 (2018); See e.g. *Thomas v. Parker*, 672 F.3d 1182, 1184 (10th Cir. 2012); *Pointer v. Wilkinson*, 502 F.3d 369, 376 (6th Cir. 2007).

¹¹⁶ Manning, *supra* note 115, at 219.

¹¹⁷ Manning, *supra* note 115, at 225; *Washington v. Los Angeles Cty. Sheriff’s Dep’t*, 833 F.3d 1048, 1057 (9th Cir. 2016); *Byrd v. Shannon*, 715 F.3d 117, 124-125 (3rd Cir. 2013); *Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2012); *Tolbert v. Stevenson*, 635 F.3d 646, 652 (4th Cir. 2011); *Thompson v. DEA*, 492 F.3d 428, 432 (D.C. Cir. 2007); See also Samuel B. Reilly, *Where is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act’s “Three Strikes” Rule*, 70 EMORY L.J. 755 (2021).

¹¹⁸ Manning, *supra* note 115, at 224; *Thomas v. Parker*, 672 F.3d 1182, 1184 (10th Cir. 2012); *Pointer v. Wilkinson*, 502 F.3d 369, 376 (6th Cir. 2007).

¹¹⁹ See, e.g., 715 F.3d at 125; *Thompson v. DEA*, 492 F.3d 428, 437 (D.C. Circuit 2007).

¹²⁰ See 715 F.3d at 125 (“Our Court has not yet stated a preferred approach for deciding when and whether “unclear” dismissals can be counted as strikes for purposes of § 1915(g). In doing so now, we

PLRA was ill-intentioned plaintiffs, however, the D.C. Circuit argued that not all dismissals should be considered strikes, declining to adopt a per se rule designating dismissal for lack of jurisdiction as grounds for a strike.¹²¹ The D.C. Circuit noted, “because understanding federal court jurisdiction is no mean feat even for trained lawyers, creating a rule that mechanically treats dismissals for lack of jurisdiction as strikes would pose a serious risk of penalizing prisoners proceeding in good faith and with legitimate claims.”¹²² In other words, prisoners representing themselves should not be penalized for not knowing certain legal rules.¹²³

B. Rule 20 and the PLRA

Due to the requirements of the three-strike provision, some courts have interpreted the PLRA to further alter the rights of prisoner litigants by preventing them from filing joint suits¹²⁴ or imposing specific fee requirements for joint suits.¹²⁵ Rule 20 of the Federal Rules of Civil Procedure governs the joinder of plaintiffs and defendants in civil litigation.¹²⁶ Under Section 1,

Persons may join in one action as plaintiffs if:

- (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- (B) any question of law or fact common to all plaintiffs will arise in the action.¹²⁷

The Supreme Court applies a liberal standard to the permissive joinder of parties: “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with

are guided by the driving purpose of the PLRA—preserving resources of both the courts and the defendants in prison litigation.”)

¹²¹ 492 F.3d at 437; See Beatrice C. Hancock, Three Strikes and You’re Still In? Interpreting the Three-Strike Provision of the Prison Litigation Reform Act in the Eleventh Circuit, 68 Mercer L. Rev. 1161, 1168 (2017).

¹²² 492 F.3d at 437.

¹²³ See *id.*

¹²⁴ See *Hubbard v. Haley*, 262 F.3d 1194 (11th Cir. 2001).

¹²⁵ See *Hagan v. Rogers*, 570 F.3d 146 (3rd Cir. 2009); *Boriboune v. Berge*, 391 F.3d 852 (7th Cir. 2004).

¹²⁶ FED. R. CIV. P. 20.

¹²⁷ FED. R. CIV. P. 20.

fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.”¹²⁸

Therefore, the default rule for joinder is to allow parties to proceed under one suit.¹²⁹

The PLRA does not address the application of civil procedure to prison litigation, but some circuits assume that the requirements of the PLRA alter the application of Rule 20.¹³⁰ The statute does not discuss whether courts can join *in forma pauperis* prisoner complaints under Rule 20(a)(1) or how such a joinder would affect filing fees and strikes.¹³¹ Therefore, even though joinder is generally liberally allowed, the Eleventh Circuit has determined that indigent prisoner plaintiffs cannot join under Rule 20.¹³² The Third and Seventh Circuits articulate that plaintiffs can be joined so long as they pay full filing fees, while the Sixth Circuit allows both joinder of plaintiffs and the distribution of the filing fee among plaintiffs.¹³³

In *Hubbard v. Haley*, the Eleventh Circuit concluded that the PLRA created a per se bar on the joinder of *in forma pauperis* incarcerated plaintiffs because it viewed the strike scheme as incompatible with joinder.¹³⁴ The purpose of the PLRA was to limit “abusive” prisoner civil rights and conditions of confinement litigation.¹³⁵ The text of the PLRA requires prisoners bringing civil actions *in forma pauperis* to pay a full filing fee, indicating Congress’s focus on each prisoner paying the full amount.¹³⁶ Because such plaintiffs must pay full filing fees, the Eleventh Circuit denied that the plaintiffs could join in a single action.¹³⁷ The Eleventh Circuit’s justification, however, does not explain why this perceived issue could not be rectified by

¹²⁸ *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966).

¹²⁹ *See id.*

¹³⁰ *See Hubbard v. Haley*, 262 F.3d 1194 (11th Cir. 2001); *Hagan v. Rogers*, 570 F.3d 146 (3rd Cir. 2009); *Boriboune v. Berge*, 391 F.3d 852 (7th Cir. 2004).

¹³¹ Erin Kandel, *Joining Behind Bars: Reconciling Federal Rule of Civil Procedure 20(A)(1) with the Prison Litigation Reform Act*, 85 ST. JOHN’S L. REV. 755, 758 (2011).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Hubbard v. Haley*, 262 F.3d 1194 (11th Cir. 2001).

¹³⁵ *Id.* at 1196.

¹³⁶ *Id.* at 1197-1198.

¹³⁷ *Id.* at 1198.

requiring joined plaintiffs to pay full fees or how this scheme would be preferable to the same plaintiffs filing their cases separately.¹³⁸ Given that the Eleventh Circuit seemed to presume that such cases are generally frivolous, it does not follow that increased individual cases would be desirable.

Meanwhile, the Third and Seventh Circuits allow the joinder of *in forma pauperis* prisoner plaintiffs if the plaintiffs pay full filing fees.¹³⁹ In *Boriboune v. Berge*, the Seventh Circuit acknowledged that joinder could present some issues, such as if “prisoners who have struck out under § 1915(g) and thus must prepay all filing fees unless ‘under imminent danger of serious physical injury’ . . . hope to tag along on a joint complaint.”¹⁴⁰ Even so, the PLRA did not supersede Rule 20; the PLRA does not refer to Rule 20.¹⁴¹ The Seventh Circuit saw no irreconcilable conflict between the two and declined to repeal Rule 20 by implication.¹⁴² The Seventh Circuit noted that joint litigation also presented potential costs to prisoners, as any dismissed claims could potentially count as strikes for every plaintiff.¹⁴³ Recognizing the Eleventh Circuit’s concerns about applying the person-specific fee system of the PLRA to joint litigation, the Seventh Circuit argued that “[t]hese difficulties vanish if we take § 1915(b)(1) at face value and hold that one price of *forma pauperis* status is each prisoner’s responsibility to pay the full fee in installments (or in advance, if § 1915(g) applies), no matter how many other plaintiffs join the complaint.”¹⁴⁴ Likewise, the Third Circuit stated that there was no justification

¹³⁸ The Eleventh Circuit does not discuss the possibility of requiring each joined plaintiff to pay a full filing fee or whether such plaintiffs would then attempt to file individually. The decision rests on Congress’s intent to deter prisoner litigation and its chosen tool of full filing fees. See *id.*

¹³⁹ *Hagan v. Rogers*, 570 F.3d 146 (3rd Cir. 2009); *Boriboune v. Berge*, 391 F.3d 852 (7th Cir. 2004).

¹⁴⁰ 391 F.3d at 854 (citation omitted).

¹⁴¹ 391 F.3d at 854.

¹⁴² 391 F.3d at 854.

¹⁴³ 391 F.3d at 855.

¹⁴⁴ 391 F.3d at 856.

for a categorical bar because the plain language of the statute does not refer to Rule 20, so there is no reason to disregard the Rule's unambiguous language.¹⁴⁵

The Sixth Circuit authorized both joinder of plaintiffs and collective filing fee for such plaintiffs.¹⁴⁶ It articulated that because the statute does not address the apportionment of fees in cases with multiple plaintiffs, "each prisoner should be proportionally liable for any fees and costs that may be assessed."¹⁴⁷ Arguably, this approach is most consistent with the PLRA's statutory scheme, the statute's text, statutory interpretation of both the PLRA and Rule 20, legislative history, and, most significantly, the rights at stake in this determination.¹⁴⁸

C. Heck v. Humphrey and Interpreting the Three Strike Provision

The arguments justifying the PLRA centered around the idea that prisoner complaints were inherently frivolous.¹⁴⁹ Prisoners liked filing complaints while in prison because they had nothing better to do.¹⁵⁰ However, one category of claims now considered a strike by some circuits under the PLRA is not intentionally frivolous: *Heck*-barred claims.¹⁵¹

The purpose of the three-strike provision was to prevent litigants from filing more lawsuits after their "meritless" claims were dismissed, but the Supreme Court already required dismissal of a certain type of claim under *Heck v. Humphrey*.¹⁵² Roy Heck was convicted of voluntary manslaughter and attempted to recover damages under § 1983 for an "unlawful,

¹⁴⁵ 570 F.3d at 152.

¹⁴⁶ *In re Prison Litigation Reform Act*, 105 F.3d 1131 (6th Circuit, 1997).

¹⁴⁷ 105 F.3d at 1137-1138.

¹⁴⁸ Mani S. Walia, *The PLRA and Rule 20 in Harmony: Apportioning a Single Fee for Multiple Indigent Prisoners When They Proceed Jointly*, 58 DRAKE L. REV. 541, 544-545 (2010).

¹⁴⁹ See 141 Cong. Rec. at S7526 (May 25, 1995) (statement of Senator Kyl) ("Most inmate lawsuits are meritless. Courts have complained about the abundance of such cases. Filing frivolous civil rights lawsuits has become a recreational activity for long-term residents of our prisons.").

¹⁵⁰ See *Id.*

¹⁵¹ The Ninth Circuit defines frivolous cases as having no defensible basis in fact. *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005). Courts dismiss *Heck*-barred cases because of their relationship to criminal convictions, not because the facts of the case have no defensible basis. 512 U.S. at 478-479.

¹⁵² *Heck*, 512 U.S. at 478-479.

unreasonable, and arbitrary investigation” with his criminal conviction still pending.¹⁵³ To recover damages for a § 1983 case, the Supreme Court ruled that plaintiffs must prove that their conviction or sentence was reversed on direct appeal, otherwise expunged, or challenged by a federal court issuing a writ of habeas corpus.¹⁵⁴ The Court intended to prevent collateral attacks on criminal convictions—its new rule required prior criminal proceedings to end “in favor of the accused” so that no plaintiff could prevail in a tort suit while still being convicted of the underlying criminal prosecution.¹⁵⁵ This upheld the “strong judicial policy” against having multiple ongoing cases arising out of the same transaction.¹⁵⁶

Because courts must dismiss civil lawsuits improperly challenging a criminal conviction under *Heck*, courts must determine whether such dismissals qualify as strikes under the PLRA.¹⁵⁷ The question has serious implications for who can bring prisoner suits, and circuits disagree about whether these cases constitute “failure to state a claim” and therefore warrant a strike.¹⁵⁸ While the Seventh and Ninth Circuits view failure to state a claim as a judgment on the content of pleadings, the Third Circuit interprets the language liberally, and perhaps more literally, as a determination about whether relief can be granted for the claim *in the moment*.¹⁵⁹ Accordingly, the Third Circuit automatically awards strikes based on *Heck* dismissals, but the Seventh and Ninth Circuits do not.¹⁶⁰

¹⁵³ 512 U.S. at 478-479.

¹⁵⁴ 512 U.S. at 478-479.

¹⁵⁵ 512 U.S. at 484.

¹⁵⁶ 512 U.S. at 484.

¹⁵⁷ See 17 F.4th at 423-424.

¹⁵⁸ Compare *Washington v. Los Angeles County Sheriff's Dept.*, 833 F.3d 1048 (9th Cir. 2016); *Polzin v. Gage*, 636 F.3d 834, 837 (7th Cir. 2011); *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019); *Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1191 n.4 (11th Cir. 2020) with *Hastings v. City of Fort Myers*, 2021 U.S. App. LEXIS 30023 No. 21-11220-F (11th Cir. 2021); *Garrett v. Murphy*, 17 F.4th 419, 423 (3rd Cir. 2021).

¹⁵⁹ *Id.*

¹⁶⁰ Although the First and Eleventh Circuits have also addressed this question, the circuits have not fleshed out their reasoning. The First asserts that the question is a jurisdictional issue. *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019) (holding that the excessive force claim the plaintiff raised

Because the Seventh and Ninth Circuits determine that plaintiffs fail to state a claim when the plaintiffs fail to meet pleading requirements, the circuits do not designate a *Heck*-barred claim as a pleading failure.¹⁶¹ Instead, the Seventh and Ninth Circuits characterize the *Heck* requirement as an affirmative defense.¹⁶² Therefore, in the Ninth Circuit, “a dismissal may constitute a PLRA strike for failure to state a claim when *Heck*’s bar to relief is obvious from the face of the complaint, and the entirety of the complaint is dismissed for a qualifying reason under the PLRA,” but *Heck* dismissals cannot be considered categorically frivolous.¹⁶³ Plaintiff may create a timing issue by presenting meritorious claims before successfully challenging criminal convictions, and such claims cannot be categorically considered dismissals for failure to state a claim under FRCP 12(b)(6).¹⁶⁴ Although *Heck* requires favorable termination, that is not a necessary element to a civil damages claim under § 1983 in the statute’s text, so failing to plead favorable termination is not failure to state a claim.¹⁶⁵ Just as prisoner plaintiffs are not required to prove administrative exhaustion in their pleading, but defendants can raise a plaintiff’s failure to exhaust as an affirmative defense, *Heck* compliance is an affirmative defense rather than a pleading requirement.¹⁶⁶ A dismissal under *Heck* does not determine the underlying merits of the

related to his arrest was interrelated to his criminal convictions and therefore barred by *Heck*). The Eleventh Circuit also initially held that *Heck* was a jurisdictional issue, later argued “The Supreme Court’s own language suggests that *Heck* deprives the plaintiff of a cause of action—not that it deprives a court of jurisdiction,” and then declared the question “open.” *Compare* *Harrigan v. Metro Dade Police Dep’t Station #4*, 977 F.3d 1185, 1191 n.4 (11th Cir. 2020) *with* *Teagan v. City of McDonough*, 949 F.3d 670, 677 (11th Cir. 2020); *Hastings v. City of Fort Myers*, 2021 U.S. App. LEXIS 30023 No. 21-11220-F (11th Cir. 2021).

¹⁶¹ See *Washington v. Los Angeles County Sheriff’s Dept.*, 833 F.3d 1048 (9th Cir. 2016); *Polzin v. Gage*, 636 F.3d 834, 837 (7th Cir. 2011).

¹⁶² See *Washington v. Los Angeles County Sheriff’s Dept.*, 833 F.3d 1048 (9th Cir. 2016); *Polzin v. Gage*, 636 F.3d 834, 837 (7th Cir. 2011).

¹⁶³ 833 F.3d at 1055.

¹⁶⁴ 833 F.3d at 1056.

¹⁶⁵ 833 F.3d at 1056.

¹⁶⁶ 833 F.3d at 1056.